

In Chronic Exile

A Critique of South Africa's Legal Regime for Refugees in Protracted Refugee Situations

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Signed by candidate

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DEDICATION

This thesis is dedicated to every refugee I have had the honour of assisting at the UCT Refugee Rights Clinic. I am truly grateful that our paths have crossed.

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My biggest thank you must go to my husband Sharif who has undoubtedly been my greatest champion and motivator in all my years of study.

I also owe a great thank you to my children, Yasin, Shamima and Imran. I am truly blessed to be the mother of such kind human beings. You inspire me to be the best human – rights advocate that I can be.

To my sister Saadika – there is no better way to do a Phd than to do it at the same time as a sister. Red is our colour for 2017!

A sincere thank you to my colleagues and former colleagues at the UCT Refugee Rights Unit – you have my greatest respect and admiration.

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ABSTRACT

The major thrust of refugee protection worldwide is directed towards providing assistance to refugees in emergency situations. In South Africa, a large number of refugees have moved beyond this initial emergency phase such that the extended nature of their refugee status has left them in a state of continuous vulnerability. Their prolonged exile has led to violations of various rights recognised by international law and South Africa's own constitutional and refugee law. Faced with restricted access to rights, refugees in South Africa live in poverty, are frustrated, and do not realise their full potential, to say nothing about the overt and brutal attacks they constantly face as victims of xenophobia. Their continued status as refugees deprives them of opportunities and subjects them to constant fear of harassment and exploitation. Even though neither the UNHCR nor the South African government has classified refugees living in South Africa as being in a protracted situation, many refugees have been in South Africa for five years or longer, with no durable solution in sight. This thesis highlights the plight of refugees in protracted refugee situation in South Africa and recommends suitable solutions to the problems this situation raises.

Refugees, protracted refugee situation, naturalisation, assimilation, local integration, permanent residence, durable solutions, refugee law, UN Refugee Convention

CONTENTS

1. TITLE PAGE	i
2. DECLARATION	ii
3. DEDICATION	iii
4. ACKNOWLEDGEMENTS	iv
5. ABSTRACT	v
6. CONTENTS	vi

CHAPTER ONE: INTRODUCTION

1. INTRODUCTION	2
2. RESEARCH CONTEXT	5
3. INTERNATIONAL LAW AND REFUGEES IN PROTRACTED REFUGEE SITUATIONS: AN OVERVIEW	9
4. IDENTIFYING PROTRACTED REFUGEE SITUATIONS	14
5. RESEARCH AIMS AND OBJECTIVES	15
6. THE CONCEPTUAL APPROACH: A ‘SAFETY AND DIGNITY’ PERSPECTIVE	16
7. LITERATURE REVIEW	19
8. METHODOLOGY	23
9. CONCLUSION AND CHAPTER SYNOPSIS	24

CHAPTER TWO: THE CONCEPT OF A PROTRACTED REFUGEE SITUATION AND ITS IMPLICATIONS

1. INTRODUCTION	28
2. THE SUPPOSED TEMPORARY NATURE OF REFUGEEHOOD IN INTERNATIONAL LAW	29
2.1. The UN Refugee Convention	30
2.2. Refugee Camps as a Manifestation of Temporariness	32
2.3. The UNHCR as a Temporary Institution	36
2.4. Temporary Protection as a New Form of Protection	38
2.5. Protracted Refugee Situations as a Challenge to the Temporariness of Refugeehood	40
3. DEFINITION OF PROTRACTED REFUGEE SITUATIONS	41
3.1. Definitions Developed by the UNHCR	41
3.1.1. Temporal Requirement	45
3.1.2. Geographical or Social Context	46
3.3. Interim Conclusion on the UNHCR Definitions	47
3.4. A Brief Overview of the 2009 Conclusion on Protracted Refugee Situations	50
4. CAUSES OF PROTRACTED REFUGEE SITUATIONS	51
5. EXAMPLES OF PROTRACTED REFUGEE SITUATIONS	54
5.1. Historical Perspective	54

5.2. Palestinian Refugees	56
5.3. Post-colonial African Refugees	57
5.4. Sahrawi Refugees.....	59
5.5. South Africa as an Example of Urban Refugees in a Protracted Refugee Situation	60
6. PROBLEMS FACED BY REFUGEES IN PROTRACTED SITUATIONS	61
7. CONCLUSION.....	63

CHAPTER 3: INTERNATIONAL LAW AND PROTRACTED REFUGEE SITUATIONS

1. INTRODUCTION.....	66
2. THE PROTECTION OF THE RIGHTS OF REFUGEES IN INTERNATIONAL LAW.....	66
3. MEMBERSHIP OF A NATIONAL COMMUNITY AS A PRECONDITION FOR THE EFFECTIVE PROTECTION OF REFUGEE RIGHTS?	69
4. THE UN REFUGEE CONVENTION AND REFUGEES IN PROTRACTED SITUATIONS.....	75
5. ASSIMILATION AND NATURALISATION.....	78
5.1. Introduction.....	78
5.2. Assimilation: The Local Integration Approach.....	81
5.2.1 What is Local Integration?.....	81
5.2.2 Local Integration as a Durable Solution	83
5.2.3 Is the Availability of ‘Rights on Paper’ Sufficient for the Social, Legal, and Economic Integration of Refugees.....	85
5.2.4 Conclusion.....	91
5.3 Naturalisation.....	92
5.3.1 Definition and Implications.....	92
5.3.2 States’ Obligations in Relation to Naturalisation.....	95
5.3.3 Length of Legal Sojourn before Acquiring Nationality.....	97
5.3.4 Conclusion.....	98
6. SOLUTIONS FOUND ELSEWHERE IN INTERNATIONAL LAW	98
6.1 The OAU Refugee Convention.....	99
7. BURDEN-SHARING AND REFUGEES IN PROTRACTED SITUATIONS	100
8. CONCLUSION.....	106

CHAPTER FOUR: THE EVOLUTION OF SOUTH AFRICAN LAW AND POLICY

1 INTRODUCTION	109
2 THE EVOLUTION OF REFUGEE LAW IN SOUTH AFRICA	109
2.1. Introduction	109
2.2. Colonial and Apartheid Refugee Law and Policy	110

2.3. Post-Apartheid Refugee Law and Policy	112
2.3.1. A Brief Overview of the Refugees Act.....	115
2.3.2. Protracted Refugee Situations in Current Refugee Legislation.....	118
2.3.3. The Issue of a Protracted Refugee Situation in the 2016 Green Paper.....	121
3. SOUTH AFRICA'S ADOPTION OF AN URBAN REFUGEE POLICY	123
4. SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK	131
4.1 The Bill of Rights and Non-Citizens	131
4.2 The Right to Equality, Non-Discrimination and Human Dignity.....	133
4.3 The South African Courts Interpretation of the Rights to Dignity and Equality?	136
5 HOW HAS THE RIGHT TO DIGNITY AND EQUALITY FOR REFUGEES BEEN INTERPRETED BY THE SOUTH AFRICAN COURTS?.....	138
5.1 By Limiting the Sovereignty of the State	139
5.2 By Drawing Similarities with Citizens	142
5.3 By Measuring the Level of Attachment to the Host State	145
5.4 Conclusion	146
6 SOUTH AFRICA AS AN EXAMPLE OF URBAN REFUGEES IN A PROTRACTED SITUATION	147
7 CONCLUSION.....	148

CHAPTER FIVE: LOCAL INTEGRATION AS A DURABLE SOLUTION

1. INTRODUCTION	152
2. LOCAL INTEGRATION AS A RESPONSE TO PROTRACTED REFUGEE SITUATIONS	152
3. LOCAL INTEGRATION UNDER THE REFUGEE ACT.....	156
4. BARRIERS TO LOCAL INTEGRATION AS A DURABLE SOLUTION	159
4.1. Lack of Policy	160
4.2. Terminology: Asylum Seekers vs Refugees	162
4.3. Cumbersome Bureaucracy	164
4.4. Xenophobia	167
5. PROBLEMS RELATED TO THE SOCIAL AND ECONOMIC INTEGRATION OF REFUGEES IN PROTRACTED SITUATIONS	172
5.1. The Right of Access to Documents	173
5.2. The Right to Enabling Documents.....	177
5.3. Failure to Enjoy Other Rights	178
6. THE INADEQUACY OF LOCAL INTEGRATION AS A DURABLE SOLUTION FOR REFUGEES IN PROTRACTED SITUATIONS	180
7. CONCLUSION.....	188

CHAPTER SIX: PERMANENT RESIDENCE AND NATURALISATION AS DURABLE SOLUTIONS

1. INTRODUCTION.....	190
2. THE BIFURCATED APPROACH TO ENDING REFUGEE STATUS.....	191
2.1.Certification under the Refugees Act.....	191
2.2. The Standing Committee's Powers.....	194
2.2.1. Indefinite Refugee Status.....	196
2.2.2. Predicting a Lasting and Durable Change in the Country of Origin	197
2.2.3. Applying a Forward Looking Test.....	200
2.3. The Somali Case as Evidence of Problems with Certification	203
3. PERMANENT RESIDENCE AS A DURABLE SOLUTION	207
3.1.Definition and Legal Basis.....	209
3.2. Permanent Residence as a Solution to Refugeehood.....	214
4. NATURALISATION AS A DURABLE SOLUTION.....	215
4.1.Introduction.....	215
4.2. The Meaning of Naturalisation	217
4.3. Legal Basis and Process for Naturalisation for Refugees.....	218
4.4. Refugee Children Born in South Africa.....	220
4.5. Naturalisation for Refugees has become a Contentious Issue	222
4.6. Recent Reforms.....	223
5. CONCLUSION.....	225

CHAPTER SEVEN: CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

1. INTRODUCTION	228
2. THE NATURE OF PROTRACTED REFUGEE SITUATIONS.....	229
3. PROTRACTED REFUGEE SITUATION IN SOUTH AFRICA.....	230
4. THE NEED FOR DURABLE SOLUTIONS – PROTRACTED REFUGEE SITUATIONS ARE AN AFRONT TO HUMAN DIGNITY	231
5. DURABLE SOLUTIONS IN SOUTH AFRICA	232
6. RECOMMENDATIONS	
6.1. Formal Recognition of a Protracted Refugee Situation in South Africa	236
6.2. The Role of the UNHCR.....	236
6.3. Legal and Policy Return.....	237
6.4. Burden-Sharing and International Solidarity/Resettlement	238
6.5. Legal Empowerment of Refugees in Protracted Situations	239
7. SOUTH AFRICANS MUST PRACTICE UBUNTU	241

BIBLIOGRAPHY

1. PRIMARY SOURCES	243
1.1. Legislation.....	243
1.1.1. South African Legislation	243
1.1.2. International Legislation	246
1.2. Cases	246
1.2.1. South African Cases.....	246
1.2.2. International Cases.....	248
2. SECONDARY SOURCES	249
2.1. Journal Articles & Chapters in Books	249
2.2. Books	255
2.3. Reports	259
2.4. Working Papers.....	260
2.5. Talks.....	261
2.6. Online Sources	261
2.7. United Nations Online Resources	267

CHAPTER ONE

Introduction



'A teeming boat adrift on the South China sea'-

1. INTRODUCTION

When attempting to answer the question, who is a refugee, Shacknove wrote:

The term refugee conjures up a *mélange* of bleak images: a teeming boat adrift on the South China Sea, a bloated child in Bangladesh, a shanty town reduced to rubble in Beirut. Determining conceptually who is, and who is not, a refugee would appear to be a relatively simple matter. A refugee we might say is a person fleeing life-threatening conditions. In daily parlance and for journalistic purposes this is roughly the meaning of refugee hood.¹

In my experience as a human rights lawyer in South Africa,² Shacknove's description unfortunately applies to most refugees I have encountered. Refugees do 'conjure up a *mélange* of bleak images', the terrifying blank stares from women raped multiple times and the shocking child-like ways of a former child soldier and the unbearable melancholy of refugee claimants who fled a war situation in which they had no hand or interest but whose loss has been unimaginably great. In most cases, it is not only a material loss they experience but also loss of a family, home and everything known and familiar. The thought that they may never be able to return home, or that the home as they knew it has been lost forever, is all too overwhelming. All of them, you might say, are people having fled 'life-threatening conditions'.³

¹ A Shacknove 'Who is a Refugee' (1985) 95 *Ethics* at 277.

² I am an admitted attorney of the High Court of South Africa and currently practicing at the UCT Refugee Rights Clinic. The Refugee Rights Clinic operates as an implementing partner for the United Nations High Commissioner for Refugees (UNHCR).

³ Shacknove *op cit* note 1 at 277.

These descriptions are, however, of refugees whose misery is too obvious for all to see. Unfortunately, the media and aid agencies stop paying attention when the ‘mélange of bleak images’ are no longer visible and the refugee situation becomes prolonged.⁴

Immigrant or refugee communities have often been described by sociologists as resilient and exceptionally hardworking.⁵ In my experience, with many of my refugee clients, this is indeed the case. One young man comes to mind. Whilst practising as a lawyer at the University of Cape Town’s Refugee Rights Clinic, I was approached for assistance by a 14 year-old boy who was acting on behalf of his family, seemingly mature beyond his years, and clearly bearing the burden of the entire family. Undocumented and vulnerable to arrest and deportation, visibly terrified and bewildered, he spoke passionately on behalf of his family despite his limited command of the English language. However, 12 years later, he became a doctoral student at a university in South Africa. He is, unfortunately, still a refugee. This refugee family, 16 years into their stay in South Africa, is still struggling to find proper accommodation and is struggling to pay university fees. Although they have managed to find a place in the lower echelons of the South African labour market, they remain victims of xenophobia, not because they are perceived as ‘less than’, but simply because they are not citizens. On the one hand, they cannot fully participate in all aspects of South African life because of their prolonged refugee status. On the other hand, they cannot return to their country of origin due to the continuing conflict there. According to the United Nations High Commissioner for Refugees (UNHCR), just because this family has a range of rights they can access to integrate into the host society; resettlement to a third country is not an option.⁶

⁴ Shacknove op cit note 1.

⁵ J Hein ‘Refugees, Immigrants, and the State’ (1993) 19 *Annual Review of Sociology* at 43-59; M Hlatshwayo & S Vally ‘Violence, Resilience and Solidarity: The Right to Education for Child Migrants in South Africa’ (2014) 35 *School Psychology International* at 266-279.

⁶ P Rulashe ‘UNHCR Mulls Solutions for Refugees Affected by Xenophobia’, available at

In comparison to most refugees in South Africa, this family has benefited from the generous rights afforded to refugees. Even though they have enjoyed internal freedom of movement, access to education and health care, access to the labour market and are documented, their stay in South Africa has been marred because of their continued status as refugees.⁷ They remain on the margins of society even though they have demonstrated a willingness to integrate into the South African society.

While many refugees in South Africa are able to access various rights, they have generally been denied an opportunity to become permanent residents. This means that they will continue to remain as refugees in South Africa. The South African Refugees Act 130 of 1998 requires refugees to prove that they will remain as refugees indefinitely before being granted a more durable form of residence, such as permanent residence⁸ and, after a further five years of continuous stay in South Africa, naturalisation.⁹ Naturalisation as an end to refugee status is not unique to South Africa; it is also foreseen by the 1951 United Nations Refugee Convention Relating to the Status of Refugees (UN Refugee Convention),¹⁰ whose Article 34 requires States to give consideration in good faith to the ‘assimilation and naturalisation of

www.unhcr.org/news/.../5/.../unhcr-mulls-solutions-refugees-affected-xenophobia.html, accessed 23 January 2017; SABC ‘No Resettlement for Isipingo Refugees’, available at <http://www.sabc.co.za/news/a/ba7f128048434fec9c1bff4d1170398b/No-resettlement-for-Isipingo-refugees:-> UNHCR, accessed 24 January 2017.

⁷ J Handmaker ‘Who Determines Policy? Promoting the Right of Asylum in South Africa’ (1999) 11 (2) *International Journal of Refugee Law* at 290-309; C Johnson ‘Failed Asylum Seekers in South Africa: Policy and Practice’ (2015) *African Human Mobility Review*, available at www.sihma.org.za, accessed 3 January 2017; D Dass F Khan & K Ramjathan ‘Socio-Economic Rights of Refugees and Asylum Seekers’ in F Khan & T Schreier (eds) *Refugee law in South Africa* (2014) Juta & Co. Ltd: Cape Town at 220–233.

⁸ Section 27 of the Refugees Act 130 of 1998.

⁹ See Chapter 5 of this thesis for a more detailed analysis.

¹⁰ 189 UNTS 150 was adopted on 25 July 1951 in Geneva and entered into force on 22 April 1954.

refugees’.¹¹ It is evident that for as long as refugees remain refugees the only protection they are entitled to is a ‘surrogate protection’.¹² It is only when they are fully enfranchised as citizens that the need for a substitute or surrogate protection no longer exists.¹³

The scenario sketched above clearly raises a number of questions. How long can a refugee remain a refugee? Is it humane to expect a person to remain a refugee indefinitely? What are the human rights implications of protracted refugee situations? How can the negative human rights implications to such situations be prevented or addressed?

2. RESEARCH CONTEXT

The major thrust of refugee protection systems worldwide are directed toward providing assistance to refugees in emergency situations.¹⁴ In South Africa, a large number of refugees have moved beyond this initial emergency phase and the extended nature of their refugee status has left them in a state of continuous vulnerability. Their prolonged exile has led to the violation of a number of rights contained in the UN Refugee Convention, international human

¹¹ UN Refugee Convention at Article 34.

¹² The term ‘surrogate protection’ was first coined by Professor Hathaway in J C Hathaway & M Foster *The Law of Refugee Status* 2 ed (2014): Cambridge University Press: Cambridge at 495.

¹³ Ibid.

¹⁴ G Loescher & J Milner et al (eds) *Protracted Refugee Situations: Political, Human Rights and Security Implications* (2008) United Nations University Press: Tokyo at 3; J Konyndyk ‘Towards a New Model for Post-Emergency Refugee Assistance’, available at <http://odihpn.org/magazine/towards-a-new-model-for-post-emergency-refugee-assistance/>, accessed 5 June 2016; M Smith ‘Warehousing Refugees: A Denial of Rights, a Waste of Humanity’ *World Refugee Survey* 2004, available at <http://www.refugees.org/data/wrs/04/pdf/38-56.pdf>, accessed 11 June 2016.

rights laws applicable to refugees, and South Africa's constitutional¹⁵ and domestic refugee laws.¹⁶ Faced with restricted access to rights, refugees in South Africa live in poverty, are frustrated, and do not realise their full potential, to say nothing about the overt and brutal attacks they constantly face as victims of xenophobia. Their continued status as refugees deprives them of opportunities and subjects them to constant fear of harassment and exploitation.

Of the 112 000 recognised refugees in South Africa, the largest number are of Somali and Congolese origin,¹⁷ both of whom have been the targets of xenophobia for a number of years. It has become clear that it is their 'otherness' that makes them the target. Somalis have been seeking asylum in South Africa since 1994. It can thus be deduced that the first Somali refugees to arrive in South Africa have been holding refugee status for more than 20 years.¹⁸ Similarly, Rwandan and Burundian refugees fled to South Africa in the aftermath of the genocide in those countries in the early 1990s.¹⁹ Congolese refugees have also been in South Africa since the overthrow of the Mobutu regime towards the end of the 1990s.²⁰ They have clearly been living in South Africa since their initial displacement and are finding themselves in seemingly unending exile.

¹⁵ Constitution of the Republic of South Africa, 1996.

¹⁶ Refugees Act.

¹⁷ UNHCR 'The UNHCR Statistical Yearbooks', available at <http://www.unhcr.org/pages/4a02afce6.html>, accessed 24 June 2016.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

This is precisely the type of refugee situation that the UNHCR refers to as a ‘protracted refugee situation’.²¹ Somalis, in particular, are unable to return to Somalia where conflict and persecution persists.²² These refugees cannot go home because of the continuing nature of the conflict in their countries and none of the available solutions seem to be appropriate or attainable. Voluntary repatriation is clearly not a solution where the violence in the country of origin is on-going.²³ The resettlement programme is not large enough to cater for this entire class of refugees,²⁴ while the third solution of local integration, of which the end-product could be naturalisation, has thus far been interpreted so narrowly that only a handful of long term refugees have been able to access this solution.²⁵ South Africa has also failed to

²¹ UNHCR Executive Committee Conclusion No 109 (LXI) – 2009 on Protracted Refugee Situations, , UN GA Doc A/AC.96/1080, 8 December 2009).

²² Human Rights Watch ‘World report 2015 – Somalia’ (2015), available at <http://www.refworld.org/docid/54cf838115.html>, accessed 2 July 2016.

²³ UNHCR ‘Discussion Note on Protection Aspects of Voluntary Repatriation Discussion Note on Protection Aspects of Voluntary Repatriation EC/1992/SCP/CRP3’ (1-04-1992), available at <http://www.unhcr.org/print/3ae68cd314.html>, accessed 26 August 2016; See also B S Chimni ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23 *Refugee Quarterly Status* at 55.

²⁴ Ibid at Chimni.

²⁵ J Crisp ‘The Local Integration and Local Settlement of Refugees: A Conceptual and Historical Analysis’, Working Paper No 102 (2004) available at <http://www.unhcr.org/407d3b762.pdf>, accessed 14 August 2016. Crisp explains that Local Integration is a legal, economic, and social process granting refugees rights and entitlements; it allows them to become self-reliant and they are able to live amongst or alongside the host population, without fear of systematic discrimination; A Fielden ‘Local Integration: An Under-Reported Solution to Protracted Refugee Situations’ *New Issues in Refugee Research* UNHCR Research Paper No 158, June 2008; K Jacobsen ‘The Forgotten Solution: Local Integration for Refugees in Developing Countries’ Working Paper No 45, Tufts University, available <http://www.unhcr.org/3b7d24059.html>, accessed 8 June 2015 at 1; See also chapter 5 of this thesis.

implement its progressive refugee laws effectively and this has led to an unacceptable situation where large numbers of refugees are living in a state of limbo.

The UNHCR has recognised protracted refugee situations as a major problem and has in the last decade attempted to address this issue.²⁶ The problem of protracted refugee situations is best summarised as follows by the UNHCR:

The majority of today's refugees have lived in exile for far too long, restricted to refugee camps or eking out a meagre existence in urban centres throughout the developing world. Most subsist in a state of limbo, and are often dependent on others to find solutions to their plight.²⁷

The UNHCR has attempted to identify protracted refugee situations worldwide and has encouraged contracting States to find solutions.²⁸ According to Slaughter and Crisp, the UNHCR has assumed responsibility for protracted refugee situations in order to fill gaps in the international legal regime that were not envisaged at the time of its establishment.²⁹ Unfortunately, South Africa has not been considered in any one of these studies. This thesis will aim to draw upon the work of the UNHCR and consider whether South African laws are responsive to this global problem and have made sufficient provision for these refugees.

²⁶ Loescher et al op cit note 14.

²⁷ UNHCR 'Protracted Refugee Situations: The Search for Practical Solutions', available at www.unhcr.org/4444afcb0.pdf, accessed December 2016.

²⁸ A Slaughter & J Crisp 'A Surrogate State: UNHCR's Role in Protracted Refugee Situations' in G Loescher et al *Protracted Refugee Situations: Political, Human Rights and Security Implications* (2008) at 123-141.

²⁹ Loescher et al op cit note 14.

3. INTERNATIONAL LAW AND REFUGEES IN PROTRACTED REFUGEE SITUATIONS: AN OVERVIEW

The international law instrument specifically and comprehensively outlining the rights of refugees is the 1951 UN Refugee Convention and the African refugee instrument is the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention),³⁰ both of which declare that their purpose is to provide protection to refugees. This protection has found expression in the principle of *non-refoulement*, which guarantees that refugees will not be returned to the place of harm.³¹ Both instruments also anticipated that refugee status would cease once conditions in the country of origin have changed to the extent that it is safe for refugees to return home.³² The issue of solutions for refugees are also addressed in both instruments, albeit differently, reflecting the different historical contexts out of which these instruments developed.

The UN Refugee Convention has several civil, political and socio-economic rights³³ that allow refugees an opportunity for integration into the country of asylum. These rights provide refugees an opportunity to develop the capacity for self-reliance and to sustain themselves. It has been argued by some commentators that because these rights allow for the *local integration* of refugees, who have held the status of refugees for a considerable time, more so

³⁰ 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969 by the Assembly of Heads of States and Government CAB/LEG/24.3, entered into force on 20 June 1974, Article 11(3) (hereinafter OAU Refugee Convention).

³¹ UN Refugee Convention at Article 33(1); Article 2(3) of the OAU Convention.

³² Ibid at Article 33(1).

³³ Ibid at Articles 2-34.

than for new applicants for asylum, local integration could be seen as a durable solution for refugees in protracted refugee situations.³⁴ It can be argued by extension that refugees in protracted refugee situations are to this extent protected by the UN Refugee Convention since this treaty recognises a range of human rights for refugees.

Although local integration is a common term in refugee protection, no formal definition exists.³⁵ Local integration means, in essence, that a refugee is granted some form of durable legal status that allows him or her to remain in the country of asylum on an indefinite basis, and to participate fully in the social, economic, and cultural life of the host community. Local integration cannot be equated with permanent residence or citizenship because the refugees' legal status does not change; he or she remains a refugee.³⁶ Local integration has, however,

³⁴ S Dryden & L Hovill 'A Remaining Hope for Durable Solutions: Local Integration of Refugees and Their Hosts in the Case of Uganda', available at, <http://refuge.journals.yorku.ca/index.php/refuge/article/viewFile/21315/19986>, accessed 12 November 2016; F Khan 'Local Integration: The Preferred Solution' Paper delivered Geneva (2007), available at www.refugeerights.uct.ac.za/papersdelivered, accessed on 24 June 2016.

³⁵ Crisp op cit note 25 at 1.

³⁶ UNHCR 'Local Integration' UN Doc EC/GC/02/6. 25 April 2002. For alternate definitions of local integration see B Harrell-Bond *Imposing Aid: Emergency Assistance to Refugees* (1986) Oxford University Press: Oxford at 7 where she proposes a working definition of integration as a 'situation in which host communities are able to co-exist, sharing the same resources'; See also F Khan University of Cape Town, Refugee Rights Unit, Paper delivered at UNHCR Pre-Ex-com Consultations in July 2007 wherein the author referred to local integration as 'a course of action which allows the refugee or the asylum seeker to lead a meaningful existence within the host State; it therefore must necessarily be a process which allows for the development of the human potential. This does not necessarily mean permanent residence or citizenship'; J Hathaway *Rights of Refugees Under International Law* (2005) Cambridge University Press: Cambridge at 978 commenting on the approach suggested by Harrell-Bond states 'so conceived, local integration is not really distinguishable from the primary solution envisaged by the Refugee Convention, namely simple respect for refugee rights.'

been envisaged as solution since the establishment of the international refugee protection regime in the 1950s. The Secretary-General of the United Nations at the time predicted that:

[...] refugees will lead an independent life in the countries which have given them shelter. With the exception of hard-core cases, the refugees will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and those of their families. This will be the phase of the settlement and assimilation of refugees.³⁷

A proper application of local integration does, however, mean that the refugee can become self-reliant in the host State, provided the refugee can withstand all sorts of exclusion, such as xenophobia.³⁸ It can also help with the assimilation of refugees into the host State.

Even though it is clear that the UN Refugee Convention anticipated that refugees would return to their country of origin when conditions permit, the Convention suggests that, in addition to local integration, a more durable solution must be found in the country of asylum by obligating States to provide for the assimilation and naturalisation of refugees as soon as possible.³⁹ Ideally, local integration allows for naturalisation, but this is not always possible. Naturalisation is seen as the end product of local integration by most scholars.⁴⁰

The UNHCR has also regarded resettlement in a third country as a form of durable solution, but this option is only possible with the cooperation of States.⁴¹ Engaging in

³⁷ K Jacobsen 'The Forgotten Solution: Local Integration for Refugees in Developing Countries' Working Paper No 45 Tufts University, available <http://www.unhcr.org/3b7d24059.html>, accessed 1 June 2016 at 1.

³⁸ This is discussed in great detail at chapter five of this thesis.

³⁹ UN Refugee Convention at Article 34.

⁴⁰ Hathaway op cit note 12 at 449.

⁴¹ A Suhrke 'Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action'

resettlement operations is not an express legal obligation on States, but is an implied obligation arising from the concepts of international cooperation, international solidarity,⁴² and burden sharing.⁴³ The UNHCR Resettlement Handbook states: ‘Resettlement is the transfer of refugees from the country in which they have sought asylum to another State that has agreed to admit them as refugees and to grant them permanent settlement and the opportunity for eventual settlement.’⁴⁴ If permanent settlement implies the end of refugee status, resettlement would qualify as a durable solution because the beneficiaries would be entitled to a permanent legal status in the host country. There is no consistency in the practice of resettlement by host States and there is no agreement with regard to the durability of the status by host States.⁴⁵ Resettlement as a durable solution is, therefore, dependent on the goodwill of States.⁴⁶

Voluntary repatriation, another form of durable solution identified by the UNHCR, requires the UNHCR, States, and aid agencies to work together to return the refugees to their country of origin. The UNHCR Statute⁴⁷ is cited as authority for this solution. The UNHCR guidelines require a fundamental, stable and durable change to the situation in the country of

Journal of Refugee Studies (1998) 11 (4) at 396-415.

⁴² Articles 1, 13, 55 and 56 of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution adopted by the General Assembly 2625 (XXV).

⁴³ Ibid.

⁴⁴ UNHCR ‘The UNHCR Resettlement Handbook’ (2011), available at <http://www.unhcr.org/467fc0ee2.pdf>, accessed 2 June 2016 at 28-29.

⁴⁵ E R Thielemann & T Dewan ‘The Myth of Free-Riding: Refugee Protection and Implicit Burden-sharing’ (2006) available at <http://dx.doi.org/10.1080/01402380500512742> accessed 23 January 2017 at 351-369

⁴⁶ Ibid.

⁴⁷ Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at <http://www.refworld.org/docid/3ae6b3628.html>, accessed 3 July 2016.

origin when considering voluntary repatriation.⁴⁸ Unfortunately, the continued lack of safety within the refugees' country of origin is a predominant and often persisting factor that forces refugees to stay in countries of asylum for years and, in some cases, for generations.⁴⁹

Unlike the UN Refugee Convention, the OAU Refugee Convention does not make express provision for the rights of refugees, and hence does not expressly require the host State to guarantee any specific rights to refugees and asylum seekers. This lacuna poses problems relating to the State's obligations to facilitate the local integration of refugees. Even though the OAU Refugee Convention does not expressly advocate for refugee camps, the lack of express recognition of refugee rights conduces to the perception in host States that providing asylum and refugee status is a matter of philanthropy, and not of respect for the rights of asylum seekers and refugees. Because the OAU Refugee Convention does not expressly compel States to facilitate the integration of refugees and because many African States have signed reservations to the socio-economic rights referred to in the UN Refugee Convention, such States in Africa have been able to house refugees in camps. It is apparent that some of these refugees have lived in these camps for generations and find themselves in protracted refugee situations today.⁵⁰

⁴⁸ UNHCR 'Voluntary Repatriation: International Protection' (1996), available at <http://www.unhcr.org/3bfe68d32.html>, accessed 29 June 2015.

⁴⁹ Hathaway op cit note 12 at 921.

⁵⁰ G Loescher & J Milner 'Case Studies: Contemporary Protracted Refugee Populations in Africa and Asia' The Adelphi Papers Vol 45, Iss (2005), available at <http://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F05679320500212155>, accessed on 1 February 2017.

4. IDENTIFYING PROTRACTED REFUGEE SITUATIONS

In 2009 the Executive Committee of the UNHCR adopted an Executive Committee Conclusion on Protracted Refugee Situations.⁵¹ The Conclusion defines a protracted refugee situation as one where ‘refugees are trapped in a protracted refugee situation for five years or more after their initial displacement, without immediate prospects for the implementation of a durable solution’.⁵² This definition notably departs from that proposed in the earlier drafts of the Conclusion which described the phenomenon as a situation where 25 000 or more refugees were in a protracted situation.⁵³ Such a numerical limitation on the definition would clearly have left many refugees in unprotected exile. Even though the UNHCR has recognised protracted refugee situations as situations where refugees have been in the country of asylum for an extended period of time without the possibility of an end to their asylum status or of meaningful integration in the host State, it has not studied or identified all existing protracted refugee situations. According to the UNHCR, there are about 30 major protracted refugee situations around the world where the average length of stay of refugees in these states in ‘virtual limbo’ is approaching 20 years.⁵⁴ Loescher and Milner⁵⁵ have noted that the 30 situations that have been identified by the UNHCR do not include many of those in urban settings around the world.

⁵¹ The 2009 UNHCR ExCom Conclusion op cit note 21.

⁵² Refugee Studies Centre ‘Responding to Protracted Refugee Situations: Lessons from a Decade of Discussion’, January 2011, Forced Migration Policy Briefing 6, available at: <http://www.refworld.org/docid/4da83a682.html>, accessed 3 July 2016; UNHCR ‘Global Trends: Forced Displacement in 2015’, available at <http://www.unhcr.org/576408cd7.pdf>, accessed on 31 July 2016.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Loescher et al op cit note 14.

As noted earlier, the issue of protracted refugee situations has not yet been raised in South Africa. Yet South Africa has reached the stage where a significant number of refugees are now in a protracted refugee situation; many have been here for five years or more with no prospect of returning to their countries of origin or with no prospect of a durable solution.⁵⁶ Conditions in their country of origin have made it impossible or unrealistic for them to return home. This presents the problem of appropriate legal and policy responses to address the problems that refugees in protracted situations face.

5. RESEARCH AIMS AND OBJECTIVES

Even though neither the UNHCR nor the South African government has classified refugees in South Africa as being in chronic exile, many refugees have been in South Africa for five years or longer, with no durable solution in sight. In view of the above, the purpose of this study is to establish whether the law in South Africa adequately protects, and provides durable solutions for refugees in protracted refugee situations. The study will, therefore, address a number of specific issues: the nature and scope of protracted refugee situations; the nature of the human rights violations that refugees in protracted refugee situations face; and the measures that have been put in place to assist such refugees. The analysis of South African refugee law will reveal whether the law envisaged the problem of protracted refugee situations, inquire into the adequacy of the legal measures taken to respond to this problem, and investigate how those measures have been implemented in practice. Overall, the thesis demonstrates that although the existing law provides a legal pathway to ending refugee status

⁵⁶ See chapter 6 of this thesis for an analysis of *Somali Association of South Africa and others v The Chairperson of the Standing Committee for Refugee Affairs and others* Case No 18655/14).

in South Africa, that pathway has been inaccessible in practice. The thesis investigates why this has been the case.

By exploring these questions, this study will provide academic insight into an area of refugee law that has not been adequately addressed in legal scholarship. More specifically, it is relevant to South Africa as a host country for refugees. As noted earlier, South Africa has not yet been considered as a country with a protracted refugee situation by the UNHCR and the South African government, and neither has any research been conducted in this area. A critical aim of this study is to identify the protracted refugee situation as a problem in South Africa and to highlight the plight of refugees in this situation. Even though the rights of refugees in South Africa have been analysed in great detail and the failure to implement South Africa's generous laws has been the subject of considerable research,⁵⁷ no one has yet made the link between the failure to implement these rights and the creation of a protracted refugee situation in South Africa.

6. THE CONCEPTUAL APPROACH: A 'SAFETY AND DIGNITY' PERSPECTIVE

To answer the above questions it is important to understand how refugees perceive themselves and whether their perceptions differ from how they are perceived by States. According to Haddad, how refugeehood is perceived by States is automatically different to

⁵⁷ J A Klinck 'Recognizing Socio-Economic Refugees in South Africa: A Principled and Rights-Based Approach to Section 3(b) of the Refugees Act' *International Journal of Refugee Law* (2009) 21 (4) at 653-699; F Khan & T Schreier *supra* note 7; See also J Handmaker et al (eds) *Advancing Refugee Protection in South Africa* (2008) New York: Berghahn Books.

how refugees perceive it themselves.⁵⁸ States will be preoccupied with issues of obligation and management, whereas refugees view their status from a safety and dignity perspective.⁵⁹ It is evident that refugeehood was never meant to be or could morally be conceived of as a permanent status.⁶⁰ Refugeehood triggers a number of rights whatever the social context of the refugee, whether in a camp or an urban setting, in a developed or developing country. It is evident that the rights afforded to refugees do not automatically allow for nationality; yet, it is recognised that only rights of nationality or citizenship would allow for full participation in any given community.⁶¹ The security and sense of belonging, and the stability of being a citizen, is absent for refugees.

It is acknowledged that refugees have benefitted generously from the right to dignity, whether via international human rights laws or the incorporation of human rights in the constitutions of States.⁶² Human rights, and in particular the right to dignity that underpins all human rights, are commonly understood as being inalienable and so fundamental that persons are entitled to it by their humanity.

It has, unfortunately, also become apparent that the universality of the right to dignity as a morally inclusive right for all humanity is questionable.⁶³ The full benefit of the right to dignity is only acquired if the individuals seeking this dignity are members of a political

⁵⁸ E Haddad 'Who is (not) a Refugee?' European University Institute EUI Working Paper SPS No. 2004/6 available at <http://cadmus.eui.eu/bitstream/id/1769/sps2004-06>, accessed on 12 December 2016 at 2-28.

⁵⁹ Ibid at 18.

⁶⁰ Ibid at 19.

⁶¹ Ibid at 20.

⁶² Hathaway op cit note 36; Khan & Schreier supra note 7; H Botha 'The Rights to Foreigners: Dignity, Citizenship and the Rights to have Rights' (2013) 130 *SALJ* at 837 – 869.

⁶³ H Arendt *The Origins Of Totalitarianism* (1968) Schoken Books: New York at 296.

community.⁶⁴ It is for these reasons that the approach of this thesis will stem from the right to dignity, not simply as an abstract human right but as right that considers citizenship or belonging to a political community as a foundation for the exercise of many other rights. The philosophical approach of Immanuel Kant to dignity as a human right will be used to demonstrate that there is a greater dignity in citizenship.⁶⁵ Even though the protection by the UN Refugee Convention confirms the principle that all human beings shall enjoy fundamental rights and freedoms without discrimination,⁶⁶ it is apparent from the current refugee situation throughout the world that refugees are failing to access these rights. This thesis thus questions the rationality of the dominant approach to refugee law and shows that it is insufficient to allow refugees in protracted situations to live a meaningful life in the country of asylum.

Ultimately, refugee protection has become a contest between the universality of human rights and the sovereignty of nations.⁶⁷ This contest has a detrimental effect on the lives and livelihoods of long-term refugees and relegates refugees permanently to the status of ‘second-class citizens’. Central to this thesis is the inadequacy of the invocation of dignity as a human right; whether the function of dignity is to establish rank (Jeremy Waldron), whether it ought

⁶⁴ Ibid.

⁶⁵ De Waal J & Currie I *The Bill of Rights Handbook* 4 ed (2001) Juta Co & Ltd: Cape Town at 231. The philosophical approach of Immanuel Kant has been chosen because he is regarded as the father of the modern concept of human dignity. According to Kant, human dignity recognises the intrinsic worth of the person, it is the source of a person’s innate rights to freedom and to physical integrity, from which a number of rights flow. In South Africa it is regarded as a foundational right.

⁶⁶ UN Refugee Convention at the Preamble.

⁶⁷ *Minister of Home Affairs and Others v Watchenuka* 2004 (4) SA326 (SCA); See also Amnesty International ‘Global Refugee Statistics’ (Amnesty International, 13 August 2012) available at [Http://www.amnesty.org.au/refugees/comments/29462/](http://www.amnesty.org.au/refugees/comments/29462/), accessed 12 May 2016.

to serve as a foundational right (Immanuel Kant and his notion of intrinsic worth) or whether because of the emotions that dignity invokes (Martha Nussbaum).

This thesis will demonstrate that the right to dignity afforded to the refugee is offended because the refugee lacks membership to a political community. This conceptual approach will permeate this thesis and shape the development of its central argument.

7. LITERATURE REVIEW

A growing body of research on refugees in protracted refugee situations exists. Most of the literature on protracted refugee situations is, however, based on studies done in refugee camps.⁶⁸ Very little exists on refugees in protracted refugee situations in urban settings and no literature exist on refugees in protracted refugee situations in South Africa.

The general conclusion stemming from this review is that the current body of research is largely focussed on issues facing refugees in protracted refugee situations in refugee camps in Africa.⁶⁹ The literature does not address issues faced by refugees in protracted refugee situations in urban settings⁷⁰ in general and on refugees in a protracted refugee situation in South Africa in particular. The urban refugee experience in a developing country, such as South Africa, which has extensive laws to protect refugees, is a unique experience. Although scholars have recognised the unique challenges faced by refugees in South Africa, the

⁶⁸ E Odhiambo-Abuya 'From Here to Nowhere: Protracted Refugee Situations in Africa', in A Edwards & C Ferstman (Eds) *Human Security and Non-Citizens in the New Global Order* (2008) Cambridge University Press: Cambridge at 125-165.

⁶⁹ Ibid.

⁷⁰ N Briant & A Kennedy 'Priorities of African Refugees in an Urban Setting', (2004) 17 *Journal of Refugee Studies* at 437-459; Human Rights Watch 'Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala' (2003), available at <https://www.hrw.org/reports/2002/kenugan/>, accessed on 4 June 2016.

emphasis of their studies has not been on refugees in protracted refugee situations. The literature on South African refugee law and practice mostly focuses on issues of status determination and the rights afforded to refugees by the Constitution, refugee law and international human rights law.⁷¹ Exceptions are the article by Handmaker⁷² on voluntary repatriation and a paper delivered by Khan⁷³ on local integration. Still, the literature does not address issues of durable solutions for refugees in protracted refugee situations.

This study draws on the general literature dealing with the concept of protracted refugee situations. The works of Milner, Loescher and Crisp,⁷⁴ in particular, will be relied upon for the identification of protracted refugee situations as a problem facing the refugee world. These works deal with the nature and scope of protracted refugee situations as well as the human rights consequences faced by refugees in protracted refugee situations. In addition, the 2009 UNHCR Executive Committee Conclusion⁷⁵ will be studied in great detail in an attempt to understand the complexity of protracted refugee situations and to identify possible solutions that could be implemented in South Africa.

South Africa was not considered at all during a decade-long research conducted by the Oxford Department of International Development.⁷⁶ A policy briefing authored by Dr James Milner and Professor Gil Loescher in 2011⁷⁷ for the Oxford Department of International

⁷¹ See Khan & Schreier op cit note 7; J Handmaker, L de La Hunt & J Klaaren (eds) op cit note 57.

⁷² Handmaker et al op cit note 57.

⁷³ F Khan op cit note 7.

⁷⁴ J Crisp 'Africa's Refugees: Patterns, Problems and Policy Challenges' UNHCR Working Paper No 28, available at <http://www.refworld.org/docid/4ff582482.html>, accessed on 1 November 2016; See also Loescher et al op cit note 14.

⁷⁵ The 2009 UNHCR ExCom Conclusion op cit note 21.

⁷⁶ Refugee Studies Centre op cit note 52.

⁷⁷ Ibid.

Development on refugees in protracted refugee situations, the purpose of which was to examine in detail the history and process of identifying protracted refugee situations as a significant international policy problem, will be considered in addition to the 2009 UNHCR Executive Committee's Conclusion mentioned above. Furthermore, to illustrate how some contracting States have failed to anticipate how their restrictive policies have created protracted refugee situations and led to the violation of basic principles of international refugee law, the works of Crisp and Slaughter⁷⁸ and Bonaventure Rutinwa⁷⁹ will be considered.

Because South Africa is a signatory to the OAU Convention, sections in the Convention have a direct impact on the protracted refugee situation, such as the concept of burden-sharing, and the extension of the definition of refugees, will be reflected upon to demonstrate how these sections in the OAU Convention can be applied to assist refugees in protracted refugee situations.⁸⁰ The concept of burden-sharing in particular will come under discussion because it is the one international refugee instrument where it is specifically mentioned. A large number of refugees in Africa are in protracted situations. Betts argues that the existing global refugee regime creates an obligation on States to protect refugees on their State, but its support for refugees on other States is unclear.⁸¹

⁷⁸ Slaughter & Crisp op cit note 28.

⁷⁹ B Rutinwa 'The End of Asylum? The Changing Nature of Refugee Policies in Africa', 10 May 1999, ISSN 1020-7473, available at: <http://www.refworld.org/docid/4ff597752.html> accessed 17 January 2016 at 5-6.

⁸⁰ M Sharpe 'Organisation of African Unity and African Union Engagement with Refugee Protection: 1963-2011' (2013) 21 *African Journal of International and Comparative Law* at 50-94.

⁸¹ A Betts 'Public Goods Theory and the Provision of Refugees Protection: The Role of the Joint Product Model in Burden Sharing Theory' (2013) 21 *African Journal of International and Comparative Law* at 50-94; E Odhiambo-Abuya 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective' (2007) 19 *International Journal of Refugee Law* at 51-95; G Okoth-Obbo 'Thirty Years on: A Legal Review of

The available literature also deals with some of the concerns related to finding solutions for refugees, especially those pertaining to security.⁸² This chapter will explore and critique those concerns to lay the groundwork for the development of possible durable solutions. Thus far, extensive research has been done on three possible solutions.⁸³ This study will consider their applicability in protracted refugee situations in South Africa

Furthermore, Betts asserts that the link between refugee studies and migration is particularly important when reflecting on solutions for refugees in protracted refugee situations. According to Betts, migration studies views refugees as active participants and

the 1969 OAU Refugee Convention Governing Specific Aspects of Refugee Problems in Africa (2001) 20 *Refugee Survey Quarterly* at 79-138; A Zimmerman & C Mahler 'General Provisions' in Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, A Commentary* (2011) Oxford University Press: Oxford at 185-203; M Sharpe 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 *McGill Law Journal* at 11-12.

⁸² N Binaifer 'In the Name of Security: Erosion of Refugee Rights in East Africa' World Refugee Survey, USCR, available at <http://reliefweb.int/report/kenya/name-security-erosion-refugee-rights-east-africa>, accessed on January 2017; J Milner 'Sharing the Security Burden: Towards the Convergence of Refugee Protection and State Security' (2000) Working Paper Series No 4, University of Oxford, Queen Elizabeth House;

A Betts 'International Cooperation between North and South to Enhance Refugee Protection in Regions of Origin' (2005) UNHCR Working Paper No 25 at 40-63; B S Chimni 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* at 350-374; B Rutinwa 'Presence of Refugees: Impact on Local Governance and Administration' (2004) *The African*; G Loescher & J Milner *Protracted Refugee Situations: Domestic and International Security Implications*, (2005) Oxford University Press: Oxford at 35-50.

⁸³ B Harrell-Bond 'Repatriation: Under what Conditions is it the Most Desirable Solution for Refugees? An Agenda for Research' (1989) 32 *African Studies Review* 41-69; M Zieck *UNCHR and Voluntary Repatriation of Refugees: A Legal Analysis* (1997) Martinus Nijhoff Publishers: The Hague; J Hathaway 'Refugee Law is not Immigration Law' (2002) *World Refugee Survey* at 38-45.

acknowledges refugee agency.⁸⁴ Refugees, according to Betts, are active participants and seek their own solutions; they are not necessarily waiting on either the UNHCR or host governments to provide them with solutions.

It is evident that the available literature does not grant sufficient attention to durable solutions for refugees in protracted refugee situations in urban areas. Further academic scholarship on urban refugees in protracted refugee situations is therefore needed.

8. METHODOLOGY

This study will be undertaken largely from a scholarship perspective. For the scholarly research, the academic literature on protracted refugee situations, cited above in the literature review, will be drawn upon when discussing the concept of protracted refugee situations in chapter two. It will also draw on the academic literature when analysing the state of the refugees in South Africa as well as the suitability of durable solutions for refugees in protracted refugee situations in South Africa.

The thesis will also consist of legal analysis, which will not only provide a systematic review and critique of the existing international and South African laws pertaining to refugees, but will also evaluate their adequacy and recommend changes where necessary. There are several international and regional conventions that provide protection and durable

⁸⁴ A Betts *Survival Migration: Failed Governance and the Crisis of Displacement* (2013) Cornell University Press: New York; A Betts 'The Migration Industry In Global Migration Governance' in T Gammeltoft-Hansen & N N Sorensen (eds) *The Migration Industry and the Commercialization of International Migration* (2012) Routledge: London; A Betts 'Global Governance of Migration and the Role of Trans-Regionalism' in R Kunz, S Lavenex & M Panizzon (eds) *Multi-layered Migration Governance: The Promise of Partnership* (2012) Routledge: London; P J Ngandwe 'The Paradox Of Migration and the Interests of Atomistic Nation-States: The Southern African Perspective' (2013) 16 *PER* at 427.

solutions to refugees in protracted refugee situations. These conventions provide the broad legal principles for providing protection and formulating durable solutions to refugees in protracted refugee situations and have been complimented by several UNHCR Conclusions.

This thesis also draws on my experience as a legal practitioner, with more than 13 years' experience heading the Refugee Rights Unit at the University of Cape Town, which advises on and represents refugees in various legal issues concerning their status. This information will be used in a way that respects my ethical duties as a legal practitioner and academic researcher.

9. CONCLUSION AND CHAPTER SYNOPSIS

This chapter has provided in broad outline a gist of the main issue that refugees in protracted situations face in South Africa. This issue revolves around ending the status of refugee status where repatriation to the home country is not possible. Should such refugees remain refugees indefinitely? What are the human implications of such a prolonged status? Are their durable solutions to protracted refugee situations? Has South Africa fashioned suitable durable solutions? If so, how accessible have been such solutions in practice? These are the core questions this thesis seeks to address.

Chapter two unpacks the concept of protracted refugee situations. It begins by reviewing the supposed temporary nature of refugeehood and investigates whether the international refugee law anticipated protracted refugee situations. The UNHCR has in the previous decade directed its attention to protracted refugee situations and suggested a working definition that will be analysed in detail.⁸⁵ The various known protracted refugee situations will also be identified with a view to considering whether such protracted refugee situation exists in

⁸⁵ The 2009 UNHCR ExCom Conclusion op cit note 21.

South Africa as well. As noted earlier, the problems faced by *all* refugees in protracted refugee situations have not been adequately identified because the focus has thus far only been on those living in refugee camp settings.

Chapter three looks at the normative framework that exists in international law on protection and solutions for refugees in protracted refugee situations. It will begin by examining the dominant approach to refugee protection and consider whether international refugee law provides a solution to long term refugeehood. More specifically, naturalization and local integration will be critiqued as possible solutions for long-stay refugees.

Chapter four will trace the evolution of refugee law in South Africa to see if it accommodates the temporary notion of refugeehood by charting its progress from its narrow race-based framework to the current one that seemingly places human rights at the centre. It will also analyse the Refugees Act with a view to providing a general overview of the legislative framework within which refugees in South Africa are given protection and care, exposing and critiquing its approach to refugees. In particular, it will address the question whether South African law and policy contemplated the problem of a protracted refugee situation. The chapter will demonstrate that because of South Africa's constitutional principles its refugee law adopted an urban policy as opposed to a camp-based one. It will furthermore analyse the provisions of the Constitution, especially those on human dignity and non-discrimination, in order to demonstrate its capacity for accommodating an approach to refugee law that can provide durable solutions to refugees caught up in protracted situations. This will be followed by an overview of the rights and jurisprudence that have evolved on those rights concerning refugees. Finally, it will highlight the fact that refugees have been resident in South Africa for a very long time with no solution in sight even though South Africa has acknowledged the temporary nature of refugee status.

Chapter five outlines South Africa's application of local integration as a durable solution for its urban-based refugees. It will furthermore investigate whether South Africa's local integration initiative has managed to effectively conceptualise and implement the UNHCR's urban refugee policy. It is evident that refugee law in South Africa is based on its constitutional values and that it has therefore adopted a human rights approach. This chapter will therefore consider whether the rights identified by the UNHCR deemed necessary for the local integration of urban refugees can adequately protect refugees for it to be considered a durable solution. The purpose of the chapter is to establish whether the legal entitlements to the rights granted in South Africa are sufficient to allow for the legal, economic and social integration of refugees and whether it is sufficient for the protection of refugees in a protracted situation?

Chapter six argues that only an end to refugee status can be considered a durable solution for a refugee in a protracted refugee situation. It also affirms that there is a legal pathway to *end* refugee status in South Africa by permanent residency and thereafter by means of naturalisation. The main focus of this chapter will be an analysis of the possible options that are tentatively available for the refugee to end his or her refugee status in South Africa and to be provided with a more durable form of residence than that which is offered by refugee status. This chapter will thus analyse the basis upon which a refugee can apply for permanent residence and naturalisation or citizenship in terms of South African law. The focus of this chapter is thus the change of legal status from refugee status to a more durable status such as permanent residence or naturalisation which will guarantee that a protracted situation is either ended or will not develop.

Chapter seven will draw a conclusion and it makes some recommendations to end protracted refugee situations, and more importantly to prevent it from occurring in the first

place. It will also suggest solutions for those refugees currently in a protracted refugee situation

CHAPTER TWO

The Concept of a 'Protracted Refugee Situation' and Its Implications

1. INTRODUCTION

The problems faced by all refugees in protracted refugee situations have not been adequately identified because the focus has thus far been only on those living in refugee camp settings.⁸⁶

This chapter will begin by reviewing the supposed temporary nature of refugeehood, which remains a stumbling block to addressing the problem of indefinite refugee exile. The key question posed is whether the drafters of international refugee law anticipated protracted refugee situations. It will be useful to investigate whether there have historically been such situations in the world, whether they were considered problematic and what solutions were adopted.

Moreover, the need to define protracted refugee situations is acute, not just for the refugees from a humanitarian and a human rights perspective, but also for States, the UNHCR, as well as agencies tasked with the caring of persons displaced for prolonged periods.⁸⁷ The UNHCR was able to direct its attention to the plight of long-term refugees and consequently drafted an Executive Committee Conclusion on Protracted Refugee Situations,⁸⁸ suggesting a working definition that will be analysed in detail. A brief overview of this Conclusion on will also be undertaken. The various known protracted refugee situations will be discussed with a view to drawing some key feature of the notion of protracted refugee situations.

⁸⁶ Loescher op cit note 14; Crisp op cit note 25; Amaya-Castro 'International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis' in M K Bulterman & W J M van Genugten (eds) *Netherlands Yearbook of International Law* (2013); N H Goetz 'Lessons Learnt from a Protracted Refugee Situation', available at <http://ccis.ucsd.edu/wpcontent/uploads/2012/07/wrkg74.pdf>, accessed on 5 February 2016.

⁸⁷ Loescher op cit note 14 at 3.

⁸⁸ The 2009 UNHCR ExCom Conclusion op cit note 21.

⁸⁹ Hathaway & Foster op cit note 12.

2. THE SUPPOSED TEMPORARY NATURE OF REFUGEEHOOD IN INTERNATIONAL LAW

The status of a refugee was seemingly never envisaged to be a long-lasting status. On the contrary, it was always meant to be of a temporary nature. According to Hathaway and Foster, the UN Refugee Convention conceives of refugee status as a ‘transitory phenomenon that comes to an end if and when a refugee can reclaim the protection of his or her State or has secured an alternate form of status.’⁸⁹ In reality, refugee status may be indefinite and the perpetual refugee status of most of the world’s refugees today provide clear evidence hereof.

The temporary nature of refugeehood was highlighted by the first UN High Commissioner for Refugees in the statement made soon after the inception of the UN Refugee Convention in 1951. He stated that ‘the status of a refugee should not be a permanent one’.⁹⁰ The context within which he made this statement was the residual case load of refugees after World War II.⁹¹ The issue of displaced persons in Europe was resolved some 20 years after the end of World War II. Today’s protracted refugee situations show no signs of resolution.⁹²

The position of the UNHCR maintains that the international protection afforded to refugees is considered to be of an essentially temporary nature:

It is the return of refugees to their own community or their integration into a new one which constitutes a permanent or durable solution...[I]nternational protection is of an essentially

⁸⁹ Hathaway & Foster op cit note 12.

⁹⁰ UN General Assembly ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the Second Meeting’ UN Doc A/CONF2/SR2, 20 July 1951.

⁹¹ J Milner ‘Protracted Refugee Situations: The Search For Practical Solutions’ in G Loescher & J Milner *The State of the World’s Refugees* (2006) Oxford University Press: Oxford at 105-127.

⁹² Ibid at 105.

temporary nature and is the sum of all action which seeks to achieve the admission of a refugee into, and his secure stay in a country where he or she is not in danger of refoulement and can enjoy basic rights and human treatment until the above objective is achieved – that of a renewed belonging to a community.⁹³

2.1. The UN Refugee Convention

Various elements of the UN Refugee Convention attest to the temporary nature of refugeehood. First and foremost, the UN Refugee Convention imposes no obligation on States to grant permanent admission to refugees. The legal obligation is only to host the refugee whilst he or she is at risk.⁹⁴ In further recognition of the temporary nature of refugee

⁹³ UNHCR 'Note on International Protection (submitted by the High Commissioner)' UN Doc A/AC 96/680 (5 July 1986), available at www.unhcr.org/.../note-international-protection-submitted-high-commissioner.html, accessed on 10 October 2016 at 4-5.

⁹⁴ UN Refugee Convention at Article 33; UN High Commissioner for Refugees (UNHCR) 'UNHCR Note on the Principle of Non-Refoulement' November 1997, available at <http://www.refworld.org/docid/438c6d972.html>, accessed 10 October 2016.

G S Goodwin-Gill 'The Dynamics of International Refugee Law' *International Journal of Refugee law* (2013) 25 (4) at 651-666; See Also F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014) Juta Co. & Ltd: Cape Town at 3-4. The principle of non-refoulement safe-guards a refugee from being returned to a place where he or she may face serious harm; J Allain 'The Jus Cogens Nature of Non-refoulement' (2001) 13 *International Journal of Refugee Law* at 533-558; O Duffy 'Expulsion to Face Torture? The International Law Principle of Non-refoulement' *International Journal of Refugee Law* (2008) 20 (3) at 373-390; Article 33(1) of the 1951 UN Refugee Convention provides that: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.' The 1969 OAU Refugee Convention and the South African Refugees Act have a similar provision.

status, the UN Refugee Convention sets out the conditions under which refugee status shall cease to apply.⁹⁵ The ‘cessation clauses’,⁹⁶ as they have become popularly known, are cited as evidence of the supposed temporary nature of refugee status. They provide that access to national protection results in the termination of refugee status, and define various situations in which refugee status may come to an end.⁹⁷ For example, a refugee may end her refugee status by re-availing herself to her country of nationality,⁹⁸ by re-acquiring her nationality,⁹⁹ or by voluntarily re-establishing herself in her country of origin.¹⁰⁰ These three forms of cessation are when return is considered by the refugee himself or herself and when their well-being is entrusted to the country of origin. Alternately, the host country may determine that conditions in the country of origin have improved to the extent that the refugee cannot refuse to return.¹⁰¹ Finally, refugee status can come to an end if the refugee can secure the protection of another State.¹⁰² In each of these scenarios, the refugee is deemed to have secured the protection of a State and become part of a national community. These provisions show that the UN Refugee Convention was designed as a temporary substitute or, in Hathaway’s words, ‘surrogate protection’,¹⁰³ for national protection.

⁹⁵ Discussion Note on the Application of the ceased circumstances Cessation Clauses in the 1951 Convention EC/SCP/1992/CRP.1 International Protection (SCIP) 20 December 1991.

⁹⁶ UN Refugee Convention at Article 1C.

⁹⁷ Ibid.

⁹⁸ Ibid at Article 1C (1).

⁹⁹ Ibid at Article 1C (2).

¹⁰⁰ Ibid at Article 1C (4).

¹⁰¹ Ibid at Article 1C (5).

¹⁰² Ibid at Article 1C (3).

¹⁰³ Hathaway op cit note 12 at 462: ‘The purpose of refugee law is to provide surrogate protection pending the resumption or establishment of meaningful national protection.’

It was thus anticipated that, after a certain period, the refugees would no longer be in need of international protection, either because they could return to the country they had left, or because they could integrate in a country of asylum which would extend to them the same degree of protection as enjoyed by citizens of that country. The main means envisaged in the Convention to achieve integration with the host community was through assimilation and naturalisation.¹⁰⁴ However, neither naturalisation nor assimilation is necessarily guaranteed by Article 34 of the UN Refugee Convention. This article merely imposes a duty on States to *facilitate* naturalisation.¹⁰⁵

The UN Refugee Convention thus conceives the legal condition of a refugee as a temporary one. It is premised on the idea that they will one return home, resettle in a third country or become naturalised in the host country. If refugees are unable to secure permanent residence in the host country, on the one hand, or repatriation to the country of origin, on the other hand, this temporariness of status significantly impacts their lives; they will remain refugees indefinitely.¹⁰⁶

2.2. Refugee Camps as a Manifestation of Temporariness

Refugee camps reflect a sense of temporariness attached to refugee status. Large numbers of refugees in camps administered by the UNHCR are in countries where the national governments have distanced itself from the functioning of these camps.¹⁰⁷ States allowed the refugees to enter and do not refoule/return the refugees, but they do not provide them with

¹⁰⁴ UN Refugee Convention at Article 34.

¹⁰⁵ Hathaway op cit note 12.

¹⁰⁶ Amaya-Castro op cit note 86 at 74.

¹⁰⁷ Amayo-Castro op cit note 86.

legal status – these are the refugees hovering in the legal sphere and where the UNHCR and aid agencies are ‘administering human misery’.¹⁰⁸

Dunn states that refugee camps are designed for the short term. It is expected to meet an emergency need and then disappear. According to her, the temporary nature of camps shows up in their architecture. In Jordan’s Zaatari refugee camp, more than 83 000 people are housed in ‘row after stark row of simple tents that offer little shelter from snow, subzero temperatures, or flooding,’ even though there are no plans for the refugees to return to Syria or resettle anywhere else. In the Nyarugusu camp in Tanzania, Congolese refugees are forced to build their own houses out of nothing more than thatch and unbaked bricks so that the United Nations High Commission for Refugees (UNHCR), the camp administrator, can raze the structures at any moment. Thomson, an anthropologist, reiterates this view that: ‘Impermanence is designed into the refugees’ most intimate spaces. Their homes are constructed with destruction in mind.’¹⁰⁹

Refugee camps are legally possible; States can decide not to allow refugees to integrate by signing reservations to those rights in the UN Refugee Convention that allows for the freedom of movement, in particular, but also the socio-economic rights that will allow for

¹⁰⁸ Loescher & Milner op cit note 82: ‘The majority of today’s refugees have lived in exile for far too long, restricted to camps or eking out a meagre existence in urban centres throughout the developing world. Most subsist in a state of limbo, and are often dependent on others to find solutions to their plight. Their predicament is similar to that of the tens of thousands of refugees who stagnated in camps in Western Europe in the 1950s and 1960s. The High Commissioner for Refugees at the time, Gerrit van Heuven Goedhart, called those camps ‘black spots on the map of Europe’ that should ‘burn holes in the consciences of all those privileged to live in better conditions’. If the situation persisted, he said, the problems of refugees would fester and his office would be reduced to ‘simply administering human misery’.

¹⁰⁹ E C Dunn ‘The Failure of Refugee Camps’, available at <http://bostonreview.net/editors-picks-world/elizabeth-dunn-failure-refugee-camps>, accessed on 5 September 2016.

integration with the host community.¹¹⁰ Similarly, the OAU Refugee Convention does not provide for a meaningful integration into the host State because it is silent on the rights that allow integration into the host community. Hence, despite the intended temporary nature of refugee status, and the intended temporariness of refugee camps, refugees from countries where the conflict has not ended and are unable to return home have become a permanent presence in the countries where they have sought refuge. They have remained refugees in a number of States that have failed to integrate them.

Even though nobody wants camps to be permanent - not the United Nations, host States, or international aid agencies - refugee camps have lasted decades or even generations, as the situation in the refugees' home countries remains unstable. The average length of stay in a refugee camp is now more than 12 years.¹¹¹ Palestinians have been displaced since 1948¹¹² and are entering their 69th year of displacement. In Georgia, where people were displaced from a war in the province of Abkhazia 23 years ago, refugees are still living in camps.¹¹³ More than 200 000 people displaced from the Sudanese province of Darfur have been living

¹¹⁰ UN Refugee Convention, Article VI. Reservations and Declarations : At the time of accession, any State may make reservations...of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof.

¹¹¹ Refugee Studies Centre 'Responding to Protracted Refugee Situations: Lessons from a Decade of Discussion' January 2011, Forced Migration Policy Briefing 6, available at, <http://www.refworld.org/docid/4da83a682.html>, accessed 3 July 2016.

¹¹² E C Dunn op cit note 109; A Shiblak 'Residency Status and Civil Rights of Palestinian Refugees in Arab Countries' (1996) 25 *Journal of Palestine Studies* at 36-45.

¹¹³ Report of the UN Secretary-General 7 May 2014, 68th Session, Agenda Item 34, 'Protracted Conflicts in the GUAM Area and their Implications for International Peace, Security and Development, Status of Internally Displaced Persons and Refugees from Abkhazia, Georgia, and the Tskhinvali Region/South Ossetia, Georgia, available at <http://www.unhcr.org/excom/bgares/5385a0779/status-internally-displaced-persons-refugees-abkhazia-georgia-tskhinvali.html>, accessed on 22 December 2016.

in the Zamzam Camp in shelters for longer than 12 years¹¹⁴ and the Dadaab refugee camp in Kenya has been a refuge for Somalis since 1991, when their country was plunged into civil war.¹¹⁵ The Nyagurusu camp in Tanzania is decades old and houses hundreds of thousands of Congolese refugees.¹¹⁶ Many of these refugee situations are characterised by mass influxes¹¹⁷ of refugee populations and, as a result, their host countries have struggled to provide solutions where voluntary repatriation has not been possible.

These refugee camps have become the ‘physical manifestation of the limbo state’ in which refugees find themselves.¹¹⁸ As put by Remnick, refugee camps are borne out of emergency situations and evolve into ‘cities of dependency, bureaucracy and static suffering’.¹¹⁹ They

¹¹⁴ IRIN ‘The Humanitarian Situation in Darfur’ (2013), available at <http://www.refworld.org/docid/520dff864.html>, accessed on 20 February 2017.

¹¹⁵ UN High Commissioner for Refugees (UNHCR) ‘Dadaab – World’s Biggest Refugee Camp- 20 Years Old’ (2012) available at <http://www.refworld.org/docid/4f44d3782.html>, accessed on 20 February 2017.

¹¹⁶ B Rutinwa ‘Prima Facie Status and Refugee Protection’ (2002) Working Paper No. 69; M Algier *Managing the Undesirables: Refugee Camps and Humanitarian Government* (2011) Polity: Cambridge; B Harrell-Bond ‘Can Humanitarian Work with Refugees be Humane?’ (2002) 24 *Human Rights Quarterly* 51; G Verdirame & B Harrell-Bond *Rights in Exile: Janus-Faced Humanitarianism* (2005) Berghahn Books: New York.

¹¹⁷ There is no universal definition of a mass influx. It is not referred to in the UN Refugee Convention or in the OAU Convention. It is mentioned but not defined in the South African Refugees Act at section 35. It has also been described as ‘mass outflow’ or ‘mass exodus’ by the UNHCR Executive Committee General Conclusion No No 65 (XLII) on International Protection of Refugees, UN GA Doc 12A A/46/12/Add.1, 11 October 1991; see also European Union ‘Council Directive of European Union’ 2001/55/EC, available at <http://www.unhcr.org/refworld/docid/3ddcee2e4/html>, accessed on 3 December 2016; see also M Albert ‘Governance and Prima Facie Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx’ (2010) 29 *Refugee Survey Quarterly* at 61-91.

¹¹⁸ D Remnick ‘City of the Lost’ *The New Yorker* 26 August 2013, available at <http://www.newyorker.com/magazine/2013/08/26/city-of-the-lost>, accessed 13 November 2015.

¹¹⁹ Remnick op cit note 118.

become places where the States need not deal with the presence of refugees, or where the refugees actually lose their legal presence on the national territory.¹²⁰ Unlikely to return home or not well integrated in the society where they are staying, these refugees are trapped in what UNHCR calls ‘a situation of protracted displacement’.¹²¹ These refugees spend their entire lives in legal limbo, they are not refouled, and their presence is tolerated, but they are not allowed to settle or integrate.¹²² Because the temporariness of refugee status exists in the background, a situation that was meant to be temporary has slowly developed into a system that is quite permanent.

2.3. The UNHCR as a Temporary Institution

Established in 1951,¹²³ even the UNHCR was meant to be a temporary institution. Its Statute stated that its mandate was to be reviewed in 1953.¹²⁴ The UN General Assembly periodically renewed the UNHCR’s mandate until 2003, when it decided ‘to remove the temporal limitation on the continuation of the Office of the High Commissioner ... and to continue the Office until the refugee problem is solved’.¹²⁵ This has served as a constant reminder that

¹²⁰ M Kagan “‘We live in a country of UNHCR’” *The UN Surrogate State And Refugee Policy In The Middle East* (2011) available at <http://www.unhcr.org/4d5a8cde9.pdf>, accessed November 2015.

¹²¹ The 2009 UNHCR ExCom Conclusion op cit note 21.

¹²² Op cit note 116; C Gaffey ‘Kenyan Court Blocks Government Decision to Close Dadaab Refugee Camp’, available at <http://europe.newsweek.com/dadaab-camp-closure-kenya-high-court-554495?rm=eu>, accessed on 18 December 2016.

¹²³ UNGA Resolution 319 A (IV), 3 December 1949.

¹²⁴ UNGA Resolution 428 (V), 14 December 1950, at Article 5.

¹²⁵ UNGA Resolution 58/153, 24 February 2004.

refugee issues are seen as a temporary phenomenon and refugee crisis as an anomaly rather than something that needs to be accommodated in a durable way.

Unfortunately, as Loescher and Milner have argued, the ‘legal temporariness of the UNHCR and refugeehood mask their factual permanence’.¹²⁶ For far too many refugees, this temporary situation has turned into a permanent one. In spite of the fact that the UNHCR was created in order to respond to and provide relief to those facing what was thought to be only a temporary crisis of displacement, refugees under a UNHCR mandate are, as is shown later in this chapter, now in protracted refugee situations.¹²⁷

This assumption of temporariness of status has a significant impact on the lives of refugees as they ‘hover in the legal sphere of refugee status’,¹²⁸ a situation described by Oudejans as one of being ‘neither here nor there’.¹²⁹ It is apparent that refugee status is a state in which refugees *hover* for a very long time because international refugee law does not guarantee citizenship or naturalisation.¹³⁰ According to Amaya-Castro, the institution of refugee law allows States to deal with refugees by not dealing with them,¹³¹ in that States can decide not to allow refugees to integrate, so long as it does not return them to harm’s way.¹³²

¹²⁶ G Loescher & J Milner ‘Responding to Protracted Refugee Solutions: Lessons from a Decade of Discussion’ (2011) 6 *Forced Migration Policy Briefing* at 1-27.

¹²⁷ Ibid.

¹²⁸ Amayo-Castro op cit note 86.

¹²⁹ N Oudejans *Asylum: A Philosophical Inquiry into the International Protection of Refugees* (2011) Boxpress: Oisterwijk.

¹³⁰ See section 3.4 for a detailed discussion on the naturalisation of refugees.

¹³¹ Ibid.

¹³² Ibid.

2.4. ‘Temporary Protection’ as a New Form of Protection

Recently, a new phenomenon referred to as ‘temporary refugee protection’, has developed which has brought further confusion about the nature of refugee protection. There has been a drive to link the supposed temporary nature of refugeehood with a form of temporary State responsibility for the protection of refugees.¹³³ Some States have thus resisted granting formal refugee status and instead opted for short-term humanitarian assistance.¹³⁴

This new notion of temporary protection shows contrasting perspectives. On the one hand, it is seen as a non-formalized, non-specific status of State tolerance of refugees or ‘refugee-like’ persons for short or long periods of time in their territories, or on the other hand a more specific status of temporary protection with specified parameters for beneficiaries, such as duration of status, standards of rights and criteria for cessation included in domestic legislation.¹³⁵ In spite of the contrasts, it appears to have elements in common with refugee status, such as admission, non-refoulement, and basic human rights. But most importantly, it

¹³³ A Edwards ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) *Melbourne Journal of International Law* at 1-41; For a thorough study on the range of practice of temporary protection, see ‘Inter-Governmental Consultations on Asylum, Refugees And Migration Policies in Europe, North America and Australia’ (1995) available at <https://igc.ch/>, accessed on 26 October 2016.

¹³⁴ Ibid at Edwards.

¹³⁵ N Yakoob ‘Workshop Report: Report on the Workshop on Temporary Protection: Comparative Policies and Practices’ 1999 (13) *Georgetown Immigration Law Journal, Summer* at 617; J Fitzpatrick ‘Flight from Asylum: Trends toward Temporary “Refuge” and Local Responses to Forced Migration’ 1994 (13) *Virginia Journal of International Law* at 35; M Kjaerum ‘Temporary Protection in Europe in the 1990’s’ (1994) 6 (3) *International Journal of Refugee Law* at 444-456; K Hailbronner ‘Temporary and Local Responses to Forced Migration: A Comment’ 35 (1994) *Virginia Journal of International Law* at 81; S Martin et al ‘Temporary Protection: Towards a New Regional and Domestic Framework’ 12 (1998) *Georgetown Immigration Law Journal* at 543.

has eventual return as the most important element. Crucially, it does not offer a change of status from refugeehood to a more durable form of status in the host State.

This new form of temporary protection is specifically targeting refugees in mass-influx situations,¹³⁶ often offering lesser degrees of protection.¹³⁷ Fitzpatrick views the UN Refugee Convention as intended primarily for individualised assessments and therefore inappropriate for group assessments and situations of mass-influx. Rutinwa argues:

One of the matters over which a near total consensus exists is that the traditional regime of refugee protection, based on the 1951 Convention of Refugees and its regional complements is in crisis. The system is no longer adequate to deal with the problem of forced migration in the manner and magnitude it is currently being experienced. The contemporary forced migration phenomenon is characterized by mass influx of composite populations, many of whom are not refugees within the definitions found under existing instruments and therefore, strictly speaking, do not qualify for international protection.¹³⁸

Akram and Rempel have argued that temporary protection is advantageous for both the refugee and the host State.¹³⁹ For the host State, temporary protection is a humanitarian response to a mass influx and States do not have to differentiate between those who qualify under the UN Refugee Convention. It offers the host State an alternate to providing full

¹³⁶ J Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 *The American Journal of International Law* at 282; See also B Rutinwa 'Temporary Protection and its Expression Under the 'Reformulation of Refugee Law' Model' in J Handmaker et al (eds) (2001) *Perspectives On Refugee Protection In South Africa* at 50.

¹³⁷ Amaya-Castro op cit note 86 at 72.

¹³⁸ Rutinwa op cit note 79 at 50.

¹³⁹ S Akram & T Rempel 'Temporary Protection as an Instrument or Implementing the Right of Return for Palestinian Refugees' (2004) 22 *Boston University International Law Journal* at 1.

asylum and absolves it from having to grant refugee status to large groups of people. Temporary protection has been implemented as part of a responsibility-sharing deal and demonstrates to the arriving foreigner the temporary nature of the assistance.¹⁴⁰ The advantages for the putative refugee, according to the proponents, include the following: an expedited refugee application procedure, some protection rights which may be granted and the fact that putative refugee is granted, this status for a specific time frame allowing them to make plans for repatriation or resettlement.¹⁴¹

Proponents of temporary protection do not see it as being a derogation from the UN Refugee Convention or international human rights law.¹⁴² Whatever the merits of this new proposed form of protection, it is clear that it is not meant to cater for refugees in protracted situations.

2.5. Protracted Refugee Situations as a Challenge to the Temporariness of Refugeehood

As long as being a refugee is still considered an anomaly to normal citizen–State relations in international law, asylum cannot be considered a durable solution.¹⁴³ The state of refugeehood is not a solution because refugees do not have a normal citizen-State relationship. Regular migrants, on the other hand, even if they remain migrants have a choice;

¹⁴⁰ Rutinwa op cit note 79 at 140.

¹⁴¹ UNHCR ‘Conclusion on People Displaced by the Conflict in the Former Yugoslavia’ (1992), available at <http://www.unhcr.ch/legal/bibliographic/papers.4htm>, accessed on 24 March 2016.

¹⁴² J Fitzpatrick ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ (2000) 94 (2) *The American Journal of International Law* at 279-306.

¹⁴³ Edwards op cit note 133 at 10.

they can come and go from a host State as it pleases them and re-establish the normal citizen-state relation with their States.¹⁴⁴

When refugees are expected to remain refugees, they are deprived of a normal citizenship bond with a State. Only the re-attachment to a home State through repatriation or the host State through local integration, naturalisation or third country resettlement will lead to a normal citizenship bond for the refugee.¹⁴⁵ By implication, asylum or protection is intended to be temporary in nature, even though in reality it can be protracted.¹⁴⁶ It is clear that protracted refugee situations challenge the original assumption that being a refugee is a temporary and not a permanent situation.

3. DEFINITION OF PROTRACTED REFUGEE SITUATIONS

The phrase ‘protracted refugee situations’ does not appear in any hard international law documents. However, attempts have been made to define it. For example, Odhiambo-Abuya has defined protracted refugee situations in general terms as situations in which refugees remain in host countries for a prolonged, often for an unspecified duration of time, with no durable solution in sight.¹⁴⁷ In this section, the focus is on the definitions developed by the UNHCR and the criticism that those definitions have elicited.

¹⁴⁴ M Teitelbaum ‘The Role of the State in International Migration’ (2002) 8 *The Brown Journal of World Affairs* Winter at 157 -167.

¹⁴⁵ E Haddad *The Refugee In International Society: Between Sovereigns* (2008) Cambridge University Press: Cambridge at 34.

¹⁴⁶ Ibid.

¹⁴⁷ Odhiambo-Abuya op cit note 68 at 125 – 165.

3.1. Definitions Developed by the UNHCR

The UNHCR decided to develop a definition for protracted refugee situations in 2001. Since then, the UNHCR has developed several definitions of the term. The 2001 definition was proposed for adoption by the UNHCR's Africa Bureau. It identified protracted refugee situations as: Situations where refugee groups have been in exile for a long time with no durable solution in sight.¹⁴⁸

Although this definition is not particularly clear, the explanation provided by the UNHCR sufficiently highlights the plight of refugees in a protracted situation in refugee camps generally. It recognises such refugees to be in a situation where over time, 'there has been considerable changes in refugees' needs, which neither the UNHCR nor the host country have been able to address in a meaningful manner, thus leaving refugees in a state of material dependency and often without adequate access to basic rights (e.g. employment, freedom of movement and education) even after a substantial number of years in the country'.¹⁴⁹

The UNHCR came to this definition after an assessment of their annual programmes in Africa revealed that a substantial number of their programmes continued to provide for the care and maintenance for refugees who had been in exile for a long time.¹⁵⁰ The UNHCR realised that the care and maintenance programme failed to ensure that refugees lead a meaningful and dignified life in exile.¹⁵¹ The UNHCR thus identified the need to formulate a strategy to address protracted refugee situations and the term has since become a familiar

¹⁴⁸ UNHCR Africa Bureau 'Discussion Paper on protracted refugee situations in the African Region' (2001), available at <http://www.unhcr.org/3cce5e384.pdf>, accessed 13 January 2016.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

feature of the discourse on international refugee issues, especially in the African context.¹⁵² It is important to note that this definition developed because the UNHCR noted the continued ‘material dependency’ of these refugees even after a long time in exile.

When it became apparent to the UNHCR that protracted refugee situations were a worldwide phenomenon and not only an anomaly in Africa, it decided to revise the 2001 definition. In 2004 it identified it as a situation ‘in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile.’¹⁵³ It defined protracted refugee situations as situations where: Refugee populations of 25 000 or more who have been in exile for five years or more in developing countries.¹⁵⁴

The 2004 definition met with immediate resistance because of the specific numerical requirement (25 000) and to a specific region (in developing countries). Crisp, head of the UNHCR Evaluation and Policy Unit responded by formulating a definition of his own. He claimed that ‘refugees can be regarded as being in a protracted refugee situation when they have lived in exile for more than five years, and when they still have no immediate prospect of finding a durable solution to their plight by means of voluntary repatriation, local integration, or resettlement’.¹⁵⁵ His definition and understanding of protracted refugee

¹⁵² J Crisp ‘No Solution in Sight: The Problem of Protracted Refugee Situations in Africa’ (2003) Working Paper Series, available at <http://escholarship.org/uc/item/89d34q>, accessed on 14 February 2016.

¹⁵³ Africa Bureau op cit note 148.

¹⁵⁴ Executive Committee for the High Commissioner’s Programme, 10 June 2004, EC/54/SC/CRP.14- Standing Committee 30th Meeting, available at <http://www.unhcr.org/40c982172.pdf>, accessed 29 January 2016. The purpose of the UNHCR meeting was to update member States on UNHCR’s strategy on this issue, outlining the nature and dimensions of the problem and illustrating the conceptual and practical approaches that have been adopted in a number of protracted refugee situations.

¹⁵⁵ Crisp op cit note 152 at 1.

situations, he acknowledged, applied only to those situations in which refugees lived in camps.¹⁵⁶ The UNHCR's 2004 attempt to understand protracted refugee situations did not advance the meaning significantly compared to the 2001 attempt. The focus of the definition remained on their 'material dependence' on the UNHCR, the host State or aid agencies. However, it did in addition also refer to their social and psychological needs remaining unfulfilled.

The UNHCR developed another definition in 2009, which was formally accepted by members of the UNHCR Executive Committee (all member States and significant stakeholders).¹⁵⁷ According to the 2009 definition, protracted refugee situations are: situations where refugees have been in exile for five years or more after their initial displacement, without immediate prospects for implementation of durable solutions.¹⁵⁸ Milner hailed it as a significant development that reflected a 'growing international interest in one of the most complex and difficult humanitarian problems facing the world'.¹⁵⁹

This definition is an improvement as it omits any reference to the number of refugees caught in such a situation as the 2004 definition, mainly because it became clear that such a numerical limitation was arbitrary. It would have excluded many refugees who lived in

¹⁵⁶ Crisp op cit note 152.

¹⁵⁷ The UN's Economic and Social Council (ECOSOC) established the Executive Committee of the High Commissioner's Programme (ExCom) in 1958 [Resolution 672 (XXV)] and the governing body formally came into existence on January 1 1959. The Executive Committee's primary function to approve the High Commissioner's assistance programmes, available at <http://www.unhcr.org/excom/announce/3b4f09faa/background-executive-committee.html>, accessed 3 July 2016.

¹⁵⁸ UNHCR 2009a op cit note 21, preamble.

¹⁵⁹ Loescher & Milner op cit note 82.

similar situations, such as the 20 000 Rohingas in Bangladesh or the 17 000 Burundians in the Democratic Republic of Congo (DRC).¹⁶⁰

All of these UNHCR definitions, as well as that proposed by Crisp, have some elements in common, they all have a temporal, a geographic or a numerical element. As the latter has already been sufficiently addressed, the next two subsections only dwell on the first two elements.

3.1.1. *Temporal Requirement*

The first element of these definitions is that these refugees have to be in exile for a considerable time. While the 2001 definition required that refugees must be in exile ‘for a long time’,¹⁶¹ later definitions removed the uncertainty on this temporal element by replacing it with a definite minimum requirement of five years. In particular, the latest 2009 definition introduces an important element, emphasising the point from which this duration of the status is measured.

Although this time period of five years, at first appears to be random and arbitrary,¹⁶² a closer look reveals that it is not uninformed. Many countries allow for citizenship or permanent residence after a certain number of years of continuous residence, and in many countries, the minimum period of continuous residence is five years.¹⁶³ This temporal requirement means that the UNHCR is opening the possibility for ending one’s refugee status. In addition, this five year requirement is also consistent with Article 34 of the UN

¹⁶⁰ Milner et al op cit note 82.

¹⁶¹ UNHCR Africa Bureau op cit note 148.

¹⁶² Crisp op cit note 152 at 1.

¹⁶³ South African law calls for a period of five years of continuous residence before an immigrant becomes eligible for permanent residence. This will be discussed in great detail in chapter 6 of this thesis.

Convention, which encourages States to consider naturalisation and assimilation within a reasonable time as options of ending refugee status.

A notable change introduced in the 2009 definition is the phrase ‘since the initial displacement’ of the refugee.¹⁶⁴ This inclusion is particularly relevant in South Africa, where the initial displacement is ignored when refugees apply for permanent residence. In reality, refugees may have been in South Africa for 10 years on temporary asylum permits because of government’s failure to expeditiously determine their refugee status.¹⁶⁵ They only become eligible to apply for permanent residence after five years of continuous residence with documented refugee status.

Whether the solution for refugees after five years of continuous stay in a country as a refugee will be permanent residence, resettlement or repatriation, these definitions at least draw attention to the fact that refugees have been in exile for a considerable time and that the international community, including the UNHCR, should find solutions to their protracted refugee status.

3.1.2. *Geographical or Social Context*

The 2004 definition made a geographical reference to refugees in a ‘developing country’ understandably because the existing research at the time revealed that refugees in protracted situations were only found in developing countries.¹⁶⁶ The status remains largely the same

¹⁶⁴ The 2009 UNHCR ExCom Conclusion op cit note 21.

¹⁶⁵ R Amit ‘All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination’ (2012) ACMS Research Report, available at <http://www.migration.org.za/newcms/uploads/docs/report-35.pdf>, accessed 2 November 2016.

¹⁶⁶ G Loescher & J Milner ‘The Long Road Home: Protracted Refugee Situations in Africa’ (2007), available at <http://dx.doi.org/10.1080/00396330500156636>, accessed 5 October 2016.

now. For example, it has been reported by the UNHCR that in the 25 countries most affected by prolonged presence of refugees are all in the developing world.¹⁶⁷ The protracted refugee populations referred to by the UNHCR¹⁶⁸ are, in addition to being found in developing countries, typically found in refugee camps.

Unfortunately, the UNHCR has not conducted studies of long-staying urban refugees; even of those in developing countries. There is however a growing number of long-stay refugees in urban areas, South Africa being one example. Although there are clearly no refugee camps in South Africa, Somalis, Burundians, Rwandans and Congolese have been living as refugees in South Africa since 1994.

3.3. Interim Conclusion on the UNHCR Definitions

The above definitions have been widely criticised,¹⁶⁹ the main criticism being that the definitions are not comprehensive and, as a result, do not cater for all refugees in protracted refugee situations. As noted earlier, these definitions drew on the UNHCR's experience with camp-based refugees under their care. Even though the definitions do not explicitly exclude urban-based refugees, Odhiambo-Abuya and others¹⁷⁰ have raised the question whether urban-based refugees who are not in care and maintenance programs will be recognised by the UNHCR as being in a protracted situation and whether they will be eligible for assistance

¹⁶⁷ The U.S State Department 'Protracted Refugee Situations' available at <http://www.state.gov/j/prm/policyissues/issues/protracted/>, accessed 4 October 2016; UNHCR 'Global Trends Report: Displacement in 2015', available at <http://www.unhcr.org/576408cd7.pdf>, accessed 23 September 2016.

¹⁶⁸ UNHCR *ibid*.

¹⁶⁹ Odhiambo-Abuya *op cit* note 68; Milner & Loescher *op cit* note 82; Crisp *op cit* note 152.

¹⁷⁰ Odhiambo-Abuya *op cit* note 68 at 130.

from UNHCR. Odhiambo-Abuya also drew attention to the fact that because the UNHCR definitions have developed as a result of the experiences of those refugees dependent on the UNHCR for survival, the plight of those falling outside of UNHCR programmes were therefore not fully recognised. More importantly, even if the definitions developed by the UNHCR can be used to identify urban-based refugees as being in a protracted situation, the solutions suggested may not be appropriate because the specific prejudices suffered by urban based refugees are unknown.

A further major criticism is that the documents in which these definitions are articulated do not address causes of protracted refugee situations at all or discuss the harms faced by those refugees.¹⁷¹ According to Odhiambo-Abuya, this oversight would ordinarily not have mattered, but the fact that the UN Refugee Convention definition outlines the harms faced by refugees creates an expectation that the definition in the Conclusion should have the same structure.¹⁷² Milner agrees with Odhiambo-Abuya, stating that in the same way that the UN Refugee Convention definition recognises the role of the country of asylum and identifies the harm faced in the country of origin, a definition of protracted refugee situations must recognise that countries of origin, host countries and the international community are all implicated in the causes of protracted refugee situations.¹⁷³

Even though Odhiambo-Abuya finds the temporal limitation introduced in the definition inherently problematic; he questions whether the length of time a refugee sojourns in a host State should have an effect on the type of refugee protection provided.¹⁷⁴ However, Hathaway disagrees and argues that this is already the case with new arrivals benefitting from

¹⁷¹ Odhiambo-Abuya op cit note 68.

¹⁷² Odhiambo-Abuya op cit note 68.

¹⁷³ Loescher & Milner op cit note 82 at 3.

¹⁷⁴ Odhiambo-Abuya op cit note 68.

fewer rights than long-term refugees.¹⁷⁵ He states that the UN Refugee Convention is structured in this way with benefits ranging from non-refoulement, on the one hand, to access to naturalisation on the other.¹⁷⁶ A similar approach is used by the refugee aid agency providing humanitarian assistance, the type of assistance provided at the beginning of the displacement, (which automatically should be of an emergency nature) and the subsequent care and maintenance generally aiming to change to a more meaningful protection.¹⁷⁷

In spite of the above-mentioned criticisms, all the definitions have some merit. They have recognised that refugees are harmed in numerous ways as a result of being in exile for a significantly long time. In particular, the 2009 definition is commendable for various reasons. It identifies refugees who have been displaced for a period of five years or more as refugees who are in chronic exile and, more importantly, it counts the five year period from the moment of initial displacement. The merits of this inclusion must be recognised. It is the experience of many refugees that are initially received as temporary asylum seekers by a number of States that they remain with this temporary status for a number of years.¹⁷⁸ South Africa is a good example; the South African Refugees Act allows for the initial reception of refugees as asylum seekers,¹⁷⁹ the result being that many may remain with such temporary status for a number of years before refugee status is confirmed.¹⁸⁰ Equally commendable in

¹⁷⁵ Hathaway & Foster op cit 12 at 19. (See Hathaway and his levels of attachment theory)

¹⁷⁶ Hathaway & Foster op cit note 12.

¹⁷⁷ Ibid.

¹⁷⁸ E Stewart 'Exploring the Vulnerability of Asylum Seekers in the UK' (2005) 11 *Population, Space and Place* at 499–512.

¹⁷⁹ Refugees Act at section 21.

¹⁸⁰ S Mzantsi 'SA's 'alarming' asylum seeker backlog' | IOL, available at www.iol.co.za/news/south-africa/sas-alarming-asylum-seeker-backlog-2036787, accessed on 30 October 2016.

the 2009 definition is the absence of the reference to a particular geographic location. This now means that protracted situations can be found not only in developing countries, but also in developed countries, whether the refugees are housed in camps or ‘integrated’ into the communities of the host State.

3.4. A Brief Overview of the 2009 Conclusion on Protracted Refugee Situations

Most commendable about the 2009 Conclusion is that the group is recognised as being in a protracted refugee situation, not because of the lack of solution, but the lack of implementation of the durable solutions.¹⁸¹ Surprisingly, it continues to mention voluntary repatriation as the preferred solution despite the fact that the largest number of refugees in protracted refugee situations is from failed States and States trapped in protracted conflict, that is, States where it is clearly impossible for refugees to return voluntarily. While the UNHCR recognises that there can be ‘no one size fits all’ solution, its position that voluntary repatriation as the preferred solution is regrettable, given the reason above.

The 2009 Conclusion also encourages refugees in long-stay refugee situations to pursue self-reliance strategies pending durable solutions. It, unfortunately, does not promote local integration as a solution.

In terms of the Refugee Act Regulations in GN 366 GG 21075, reg 3(1) of the Refugees Act prescribes that an application for asylum should be adjudicated by the Department of Home affairs within 180 days. However, this is not the case in practice; See R Amit ‘Queue Here for Corruption: Measuring Irregularities in South Africa’s Asylum System’ (2015) Report by Lawyers for Human Rights and The African Centre for Migration and Society.

¹⁸¹ The 2009 UNHCR ExCom Conclusion op cit note 21 at para (n).

The 2009 Conclusion also noted the detrimental effects of long-lasting exile on all aspects of refugee lives, whether physical, mental, economic and social. Disappointingly though, prolonged refugee presence in the host State has only been viewed in negative terms for the State. It is said to ‘suffer negative consequences to the local environment and natural resources’. The refugees are also perceived as a burden in host States, and the Conclusion fails to recognise that refugees can benefit host societies.

There is consensus that irrespective of whether refugees are camp-based or urban refugees in protracted situations, the country of origins’ conditions is the main determinant of whether refugees cannot return home. However, the international community and the host State must find appropriate solutions. It is apparent that the solutions will be different because of the different conditions in the different countries where refugees have resided for a long time.¹⁸² The 2009 Conclusion has been criticised for, among other things, not taking into account different situations of refugees, such as undocumented and documented refugees. More than humanitarian assistance and different innovative solutions are needed for refugees in protracted situations.

The 2009 Conclusion does, however, recognise the duty of States to share the burden of protecting refugees and the need for a multi-sectoral approach within UN agencies, with elements of a humanitarian strategy. An obvious limitation of the 2009 Conclusion is that it does not have the binding effect of hard law: at best, it has the status of soft-law.

4. CAUSES OF PROTRACTED REFUGEE SITUATIONS

¹⁸² Odhiambo-Abuya op cit note 68.

According to Goetz,¹⁸³ there are two categories of causes of protracted refugee situations: direct and indirect causes. Conflict in the country of origin or issues related to the conflict in the country of origin is directly caused by, specifically, internal, ethnic, or tribal conflicts.¹⁸⁴ Conflicts often go on indefinitely. For example, the civil wars in Somalia and the eastern Democratic Republic of the Congo have gone on for a long time. Most refugees in protracted refugee situations are from war-torn countries.¹⁸⁵ Even though these crises are well-publicised and known, the international community's response to such conflicts, particularly in the African context, has been inadequate¹⁸⁶ and, as result, continued to occur, preventing refugees from returning home. On-going conflicts in the country of origin are thus a primary cause of protracted asylum.¹⁸⁷ In Africa, states Sytnik, the impossibility of return is largely attributable to the continuation of conflict in the country of origin with host country and the failure to integrate refugees in local communities and to provide them permanent residence in host countries.¹⁸⁸

Goetz also points to another direct cause of protracted refugee situations caused by refugees who have refused to return home, even after the conflict has ended in the country of origin.¹⁸⁹ They may have 'compelling reasons'¹⁹⁰ for not wanting to return and the host State

¹⁸³ Goetz op cit note 86.

¹⁸⁴ Ibid.

¹⁸⁵ Rutinwa op cit note 116.

¹⁸⁶ S Sytnik 'Rights Displaced: The Effects of Long-Term Encampment on the Human Rights of Refugees' (2012) 4 *London School of economics Working Paper Series* at 1-32.

¹⁸⁷ A Jamal 'Camps and Freedoms: Long-Term Refugee Situations in Africa' (2003) 16 *Forced Migration Review* at 4-6.

¹⁸⁸ Sytnik op cit note 186 at 9.

¹⁸⁹ Ibid.

¹⁹⁰ E Feller et al *Refugee Protection in International Law* (2003) Cambridge University Press: Cambridge. See also Khan & Schreier op cit note 7 at 35 for what is considered compelling reasons.

may in turn refuse to regularise their stay in terms of immigration laws. Paragraph 136 of the UNHCR Handbook provides an explanation of the compelling reasons exception:

It [i.e., the ‘compelling reasons’ exception] deals with the special situation where a person may have been subjected to very serious persecution in the past and not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. ... The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate.¹⁹¹

The UN Refugee Convention has not extended the compelling reasons exception to all refugees, except post-World War II Jewish refugees, who were protected from the cessation clauses.¹⁹² However, some States,¹⁹³ such as South Africa, have included the ‘compelling reasons exception’ in their domestic laws.¹⁹⁴ In States that have not included the compelling reasons exception in their domestic legislation, but who continue to tolerate such a refugee presence have added to the population of refugees in protracted situations.

According to Goetz, the failure by host States to provide alternative durable solutions to repatriation is the main indirect cause of prolonged refugee exile.¹⁹⁵ The refusal to consider alternate solutions and the lack of capacity or political will by host States is problematic from

¹⁹¹ Resettlement Handbook op cit note 44.

¹⁹² Goetz at op cit note 87; *Re C Refugee Appeal No 70366/96*, New Zealand: Refugee Status Appeals Authority, 22 September 1997, available at http://www.refworld.org/cases,NZL_RSAA,3ae6b73f14.html, accessed on 19 November 2016.

¹⁹³ UN Refugee Convention at Article 1C (5).

¹⁹⁴ Section 5 (2) of the Refugees Act of South Africa; see also Canada’s section 108 (4) of Immigration and Refugee Protection Act (SC 2001, c27); *Mayongo v Refugee Appeal Board* JOL 19645 (T).

¹⁹⁵ Goetz supra note 86.

a human rights perspective because of the failure to accept refugees as full members of the host community after a protracted period of exile has a negative impact on basic human rights.¹⁹⁶

5. EXAMPLES OF PROTRACTED REFUGEE SITUATIONS

According to the UNHCR, there are about 30 major protracted refugee situations around the world and the average length of stay is now approaching 20 years.¹⁹⁷ The bulk of these refugees are from countries where conflicts have persisted for years, such as Somalia.

5.1. Historical Perspective

The phenomenon of protracted refugee situations is not new. After World War II it took approximately 20 years for all the World War II refugees in Europe to be settled, either in their countries of origin or in third countries as resettled refugees. In the 1950s and 1960s, tens of thousands of refugees were located in camps in Western Europe; these were all refugees who could not, or refused to, return to their country of origin after World War II.¹⁹⁸ The UNHCR at the time referred to these camps as 'black spots on the map of Europe that should burn holes in the consciousness of all those privileged to live in better conditions'.¹⁹⁹ If the situation persisted, he said, his office would be reduced to administering human

¹⁹⁶ Loescher and Milner at op cit note 82.

¹⁹⁷ Loescher and Milner op cit note 167.

¹⁹⁸ Loescher and Milner op cit note 82 at 105.

¹⁹⁹ Address of Dr. Gerrit Jan van Heuven Goedhart (United Nations High Commissioner for Refugees) 'Refugee Problems and their Solutions' (Oslo 12 December 1955).

misery.²⁰⁰ The situations of the refugees in camps were settled some 20 years after the end of the World War II.²⁰¹

The climate after the World War II in Europe was such that it could absorb large numbers of people for labour.²⁰² Many countries chose to naturalise refugees or resettled them, and voluntary repatriation was not the preferred solution.²⁰³ Many chose not to return to their country of origin, even though it was clear that conditions had changed and that it was safe to return.²⁰⁴ Resettlement was also used as a durable solution for the 200 000 Hungarians who fled the 1956 Hungarian revolt,²⁰⁵ which was the first major post-war crisis that the UNHCR had to deal with.²⁰⁶

In a remarkable departure from its earlier practice, as shown above, the UNHCR and various States regarded voluntary repatriation as the preferred solution to protracted refugee solutions, as attested to in the 2009 Conclusion on Protracted Refugee Situations.²⁰⁷

5.2. Palestinian Refugees

²⁰⁰ Goedhart op cit note 199.

²⁰¹ Loescher and Milner op cit note 82.

²⁰² Loescher and Milner op cit note 82.

²⁰³ UNHCR 'History of the UNHCR' available at <http://www.unhcr.org/pages/49c3646cbc.html>, accessed on 15 March 2016.

²⁰⁴ Ibid.

²⁰⁵ B Harrell-Bond & E Vourira 'In Search of 'Invisible' Actors: Barriers to Access in Refugee Research' (2007) 20 *Journal of Refugee Studies* at 281 – 298.

²⁰⁶ M Zieck 'The 1956 Hungarian Refugee Emergency: An Early and Instructive Case of Refugee Resettlement' (2013) 5 *Amsterdam Law Forum* at 45-63.

²⁰⁷ The 2009 UNHCR ExCom Conclusion op cit note 21.

In 1948, large numbers of Palestinians became refugees and remain so to this day.²⁰⁸ Palestinian refugees in Arab States are in their 69th year of refugeehood and continue to live in the 58 refugee camps dotted across the Arab world.²⁰⁹ The cause of flight for these refugees was the newly formed State of Israel that immediately turned these refugees into stateless persons.²¹⁰ Israel has not recognised the right of return of these refugees and their host countries have consistently refused to absorb them into their host communities.²¹¹ As a result, these Palestinians are currently in a protracted refugee situation, one of the longest protracted refugee situations in the world.

In 1951 the Palestinian refugee community was already in existence. It is evident that the drafters of the 1951 UN Refugee Convention were aware of the existence of the Palestinian refugees; however, the initial response of the UNHCR was to deny Palestinian refugees assistance because of the geographic limitation of the UN Refugee Convention.²¹² The UN Refugee Convention only provided protection to refugees from Europe.²¹³ Arab States also resisted the inclusion of the Palestinian refugees under the UN Refugee Convention because the Convention places a responsibility to protect and support refugees on the host State. Instead, assistance was provided to the Palestinian refugees by the UN Relief and Works

²⁰⁸ S Kneebone *Refugees, Asylum Seekers and the Rule of Law: Comparative Law* (2009) Cambridge University Press: Cambridge at 17.

²⁰⁹ Dunn op cit note 109; Shiblak op cit note 112.

²¹⁰ Dunn op cit note 109.

²¹¹ Shiblak op cit note 112 at 36-45; Dunn op cit note 109; Harrell-Bond & Verdirame op cit note 117; Kagan op cit note 121.

²¹² B Harrell-Bond 'Refugees and the International System: The Evolution of Solutions' (1995), available at <https://www.rsc.ox.ac.uk/files/publications/other/rr-refugees-international-system-1995.pdf>, accessed on 21 October 2016. See Article 1(A) of the 1951 UN Refugee Convention.

²¹³ UN Refugee Convention; Hathaway & Foster at op cit note 12 at chapter one.

Agency Assembly Resolution in the Near East (UNWRA),²¹⁴ which was specifically created to provide social and economic assistance to them.

From the very beginning, it was obvious that the Palestinian refugee situation was heading for a protracted situation. Neighbouring Arab States, where Palestinians sought refuge, made it abundantly clear that they were not going to nationalise the Palestinian refugee.²¹⁵ The Arab States' refusal to take responsibility for the Palestinian refugees thus gave birth to the notion of a protracted refugee situation. More than 1.5 million individuals continue to live in 58 recognized Palestinian refugee camps in Jordan, Lebanon, the Syrian Arab Republic, the Gaza Strip and the West Bank, including East Jerusalem. Irrespective of whether they are under a UNHCR mandate or not, Palestinian refugees are *de facto* and *de jure* stateless refugees and those Palestinian refugees resident in an Arab State will thus remain in a protracted refugee situation unless a political solution is reached that will see their return to the homes they fled in 1948. Palestinian refugees living in neighbouring Arab States are thus the longest refugee population in modern times.

5.3. Post-colonial African refugees

According to Harrell-Bond, the 'refugee producing upheavals in Africa and Asia were presumed to be a temporary phenomenon caused by decolonization and the struggles against imperialism'.²¹⁶ The assumption in Africa, that refugees would return home when the entire

²¹⁴ The UN Relief and Works Agency Assembly Resolution in the Near East (UNWRA) was created by General Assembly resolution.

²¹⁵ Dunn op cit note 109.

²¹⁶ B Harrell-Bond *A Mazrui The African Condition : A political Diagnosis Chapter One : A Garden of Eden in Decay* (1981) Cambridge University Press: Cambridge at 1-23.

continent was liberated and that each country would be a stable nation State, influenced the contents of the OAU Refugee Convention, which, therefore, includes an explicit reference to voluntary repatriation as a solution.²¹⁷ The OAU Refugee Convention calls for a temporary intervention and assistance for refugees from a humanitarian perspective and encourages burden-sharing.²¹⁸ It not only makes it clear that that it prefers to provide protection on a temporary basis, but also endorsed this approach by excluding naturalisation and assimilation from the OAU Refugee Convention.²¹⁹ Thus, even though protracted refugee situations are not directly mentioned in the OAU Refugee Convention, the conclusion cannot be automatically drawn that protracted refugee situations were not envisaged by the drafters of the Convention.

It is evident that soon after African countries gained independence one party dictatorial regimes and military regimes sprang up, causing many citizens to flee. Internal and international armed conflicts have continued to act as the main drivers of the refugee crisis in Africa.²²⁰ Of the 30 protracted refugee situations identified by the UNHCR, more than half are in Africa.²²¹ Furthermore, more and more of these refugee situations have become protracted because those refugees cannot return home and also because they are placed in camps and not being integrated into the host communities.²²² The UNHCR first drew attention

²¹⁷ Rutinwa op cit note 79.

²¹⁸ G O Oboth 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing The Specific Aspects of Refugee Problems In Africa' (2001), available at <http://www.unhcr.org/42d673472.pdf>, accessed on 21 October 2016.

²¹⁹ Harrell-Bond op cit note 216.

²²⁰ Oboth op cit note 218.

²²¹ UNHCR 'The UNHCR Statistical Yearbooks', available at <http://www.unhcr.org/pages/4a02afce6.html>, accessed 23 June 2016.

²²² B Harrell-Bond *The Struggle for the Western Sahara* (1981) American Universities Field Staff.

to the situations of prolonged exile from their experiences in Africa; this was, however, based only on their experiences in refugee camps.

5.4. Sahrawi refugees

Some of the Sahrawi first fled the Western Sahara in 1975 after Morocco forcibly annexed the territory following the departure of the Spanish colonial government.²²³ This resulted in the establishment of the Sahrawi refugee camps near Tindouf in South-Western Algeria and is currently estimated to house approximately 155 000. They have been assisted by the UNHCR and the Algerian government since that time.²²⁴ The Sahrawi refugee context is identified by UNHCR as ‘one of the most protracted refugee situations worldwide’²²⁵ and is the organisation’s second oldest refugee caseload. This refugee community has lived in exile and have been dependent on international assistance for a considerable time.

The Polisario/SADR and the Algerian government systematically stress that neither local integration nor resettlement are considered to be acceptable or viable solutions to the protracted refugee situation,²²⁶ highlighting the need for a political solution to this political conflict. The political impasse between the Moroccan, Algerian and Polisario/SADR parties, and the lack of political will amongst international actors, renders repatriation to the Western

²²³ E Fiddian-Qasmiyeh ‘Representing Sahrawi Refugees’ ‘Educational Displacement’ to Cuba: Self-sufficient Agents or Manipulated Victims in Conflict?’ (2009) 22 *Journal of Refugee Studies* at 323-350.

²²⁴ Ibid.

²²⁵ UNHCR ‘UNHCR Algeria Factsheet (August 2010)’ Geneva: UNHCR, available at <http://www.refworld.org/docid/4caede172.html>, accessed on 21 December 2016.

²²⁶ D Brigety (2010) ‘USG Assistance to Refugees and Internally Displaced Persons in Africa’ US Department of State, Foreign Press Centre Briefing 14/07/2010, Washington, DC, available at <http://fpc.state.gov/144569.html>, accessed on November 2016.

Sahara unlikely in the foreseeable future.²²⁷ By 2017, no durable solution to this situation had been found.

5.5. South Africa as an Example of Urban Refugees in a Protracted Refugee Situation

Even though several studies have been conducted on the urban refugee population in South Africa, none have focused on the protracted refugee status of some of these refugees. Of the 112 000 recognised refugees in South Africa²²⁸ the largest number are from Somalia and Congo.²²⁹ These refugees have been living in South Africa for five years or more after their initial displacement and are finding themselves in seemingly unending exile. Somalis in particular have been living in South Africa as refugees since 1994 and are unable to return to Somalia where conflict and persecution persist. The UNHCR's resettlement programme is also not large enough to accommodate this entire class of refugees, and the third solution of naturalisation has been interpreted so narrowly that only a handful of refugees have benefited from this solution.

Whilst each of the protracted refugee situations has its own particular causes and characteristics,²³⁰ the common causes are unresolved political instability at home, and the

²²⁷ Ibid.

²²⁸ Fiddian-Qasmiyeh op cit note 223.

²²⁹ J Hickel 'Xenophobia' in South Africa: Order, Chaos, and the Moral Economy of Witchcraft' (2004) 29 *Cultural Anthropology* at 103–127; B Landau 'The Laws of (In) Hospitality: Black Africans in South Africa' (2004) *Forced Migration Working Paper Series* No 8, University of the Witwatersrand; I Palmary 'Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government' (2004), available at <http://www.csvr.org.za/docs/foreigners/refugeessafteyand.pdf>, accessed on 21 October 2016.

²³⁰ Loescher and Milner op cit note 167.

failure by the international community to increase resettlement opportunities, or host countries to integrate refugees in their communities.²³¹ These refugees may have food and shelter and an assurance that they will not be returned to a place of harm, but they do not have legal membership of the communities in which they live.

6. PROBLEMS FACED BY REFUGEES IN PROTRACTED SITUATIONS

According to the UNHCR, although the lives of refugees in protracted situations may not be at risk, ‘their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile’.²³² The challenges these refugees face may vary depending on the circumstances of each situation and each refugee. However, some common challenges have been identified.

One of the most crucial ones is that such refugees tend to lack legal membership in the community they find themselves in because they are deprived of certain key civil and political rights. According to Aleinikoff,²³³ whether or not the individual refugee has a right to nationality or of belonging to a political community, the international community has a ‘duty to resolve’ the state of refugeehood within a reasonable time. The *de facto* statelessness

²³¹ Loecher and Milner op cit note 14.

²³² UNHCR ‘Protracted Refugee Situations: The Search for Practical Solutions’ (2006) in *The State of the World’s Refugees: Human Displacement in the New Millenium*. Oxford University Press: Oxford.

²³³ T Aleinikoff & S Poellot ‘The Responsibility to Solve: The International Community and Protracted Refugee Situations’ (2014) 56 *Virginia Journal of International Law* at 196–222.

of long-term refugees is problematic and the most serious consequence of long-term refugeehood is statelessness.²³⁴

The problem of long-stay refugees in refugee camps has been the focus of much research,²³⁵ and as such the problems faced by them have generally been better identified than those of long-stay refugees in urban areas. The absolute despair of refugees in camps is well-documented.²³⁶ The rights that have been restricted, such as the freedom of movement and the prison-like situations in closed refugee camps,²³⁷ the fact that essential economic, social and psychological needs remain unfulfilled, underscores the uncertain future that many refugees face in exile.²³⁸ Refugee camps adversely affect the human dignity, human potential and physical security of refugees. The threat to the security of the refugees in camps is obvious and preventable. Even though the OAU Refugee Convention provides that camps should not be on the borders of the refugee-producing countries, in practice many refugee camps in Africa have been established along borders.²³⁹ The lack of laws, especially where States have relinquished the governance of the camps to aid agencies, has led to the violation of women and girls in particular. The refugee camp situation cannot lead to self-sufficiency

²³⁴ In terms of Article 1 of the 1954 UN Convention Relating to the Status of Stateless Persons the definition of a stateless person is a person who is not considered as a national by any State under the operation of its law.

²³⁵ USCRI 'Statement Calling for Solution to End the Warehousing of Refugees' (2009)) *US Committee for Refugees and Immigrants* available at <http://www.uscridrefugees.org>, accessed on 15 March 2016, M Agier 'Between War and City: Towards an Urban Anthropology of Refugee Camps' (2002) 3 *Ethnography* at 317–341; Harrell-Bond op cit note 223; R Black 'Putting Refugees In Camps' (1998) *Forced Migration Review* 2-7; Sytnik op cit note 186; M Smith 'Warehousing Refugees: A Denial of Rights, a Waste of Humanity' (2004) *US Committee for Refugees and Immigrants* available at <http://www.uscridrefugees.org>, accessed on 15 March 2016.

²³⁶ Agier op cit note 235.

²³⁷ Agier op cit note 235.

²³⁸ Ibid.

²³⁹ 1969 OAU Convention, Article II (3).

and integration for the refugee population thus prolonging the stay of the refugee and reinforcing the dependency status of camp-based refugees.

This thesis will investigate how the basic rights of long-term refugees living in urban areas are affected. How does such impact compare with those of the refugees in refugee camps?

7. CONCLUSION

This chapter has shown that international refugee law is based on the idea that refugee protection is based on the presupposition that refugee status is a temporary one, and therefore that protection will subsist as long as the cause of flight exists. Such presuppositions about temporariness can be found in the UN Refugee Convention which places on states to provide protection to refugees for the duration a refugee is at risk and the provisions about cessation of refugee status. It is also evident in the practice of keeping refugees in refugee camps and in the fact that the UNHCR itself was created as temporary institution, although it has been renewed periodically since it was first established.

However, the existence of protracted refugee situations presents challenges to the supposition of temporariness of international refugee law. As this chapter has shown, such situations have existed from the time the UN Refugee Convention was adopted up to now. After several attempts, the UNHCR has provided a satisfactory definition of protracted refugee situations. It has said that a refugee situation will be deemed to be protracted refugees have been displaced and lived in exile for a period of at least five years from the moment of the initial displacement with no end to their status in sight. On this definition, more than 30 refugee situations have been adjudged as being protected. This thesis uses this definition to argue that such situation exists with respect to refugees of Somali and Congolese origin living in South Africa.

As the temporary nature of refugee status is not acknowledged and host states simply receive refugees without having a commitment to secure an end to their refugee status, protracted refugee situations will continue to develop. Refugees in protracted situations face serious denials of human rights. For example, they lack legal membership in the community they find themselves in because they are deprived of key civil and political rights. As their situation becomes more and more protracted, they also become more prone to statelessness. This thesis argues that durable solutions must be found for these refugees in order to avoid these human rights violations.

CHAPTER THREE

International Law and Protracted Refugee Situations

1. INTRODUCTION

This chapter looks at the normative framework in international law on the protection of refugees and will consider whether it makes sufficient provision for refugees in protracted situations. It will begin by providing an overview of the international protection of refugee rights and demonstrate why guaranteeing refugees rights on paper in the host country does not matter much in practice. Thereafter, the chapter will consider the question whether States have an international obligation to find durable solutions to prolonged refugee status. What is the nature of such an obligation? Is it founded on treaty law, soft law or both?

Crucially, this chapter investigates the possible durable solutions that international law provides. In particular, it considers and critiques the international law provisions on local integration or assimilation and naturalization. How are these terms couched in international law? What kinds of obligations do they impose on States?

Lastly, this chapter considers the notions of burden-sharing and international solidarity as possible solutions to protracted refugee situations.

2. THE PROTECTION OF THE RIGHTS OF REFUGEES IN INTERNATIONAL LAW

As noted in the introductory chapter, the most important treaty protecting the rights of refugees in international law is the UN Refugee Convention. In Africa, this treaty has been supplemented by the OAU Refugee Convention. In addition to these two, various international human rights treaties²⁴⁰ recognise several rights that can be used to protect

²⁴⁰ International Covenant on Civil and Political Rights (1966). Hereafter referred to as ICCPR; International Covenant on Economic, Social and Cultural Rights, (ICESCR) GA Res 2200A (XXI), 21 UNGAOR Supp (No

refugees. It is, therefore, no longer possible to interpret or apply the UN Refugee Convention in isolation. The 1969 Vienna Convention on the Law of Treaties²⁴¹ makes it clear that provisions of international treaties must be interpreted based on the ordinary meaning of the words used and in the context of the whole treaty, including its purpose, and in the juridical context of subsequent agreements concluded by States' parties.²⁴² Such subsequent agreements include human rights treaties and the jurisprudence interpreting them.²⁴³

In light of the UNHCR's Executive Committees' Conclusion No 8,²⁴⁴ it appears to be perfectly rational to adopt a human rights approach when applying the UN Refugee Convention.²⁴⁵ The UNHCR Executive Committee states that the duty to protect refugees goes beyond respecting the norms of refugee law; it includes the obligation 'to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights

16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976. Hereafter referred to as ICESCR; Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175, available at <http://www.refworld.org/docid/3ae6b39620.html>, accessed 24 October 2016.

²⁴¹ Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331. Hereafter referred to as the Vienna Convention.

²⁴² T Clark & F Crepeau 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17 *Netherlands Quarterly of Human Rights* at 389-410.

²⁴³ Ibid at 390.

²⁴⁴ UNHCR Executive Committee General Conclusion No 81 on International Protection, UN GA Doc 12A A/52/12/Add.1, 17 October 1997.

²⁴⁵ R Rubio-Marin (ed) *Human Rights and Immigration* (2014) Oxford University Press: Oxford; See V Chetail 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' (2014), available at <http://www.oxfordscholarship.com/page/privacy-policy>, accessed on 22 October 2016.

and humanitarian law instruments bearing directly on refugee protection'.²⁴⁶ This view is understandable given that treaties, such as the ICCPR, extend their protection to 'everyone' or to 'all persons'. For example, Article 2 of the ICCPR obligates each State party 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind'.²⁴⁷ The Human Rights Committee, which monitors the implementations of the ICCPR, has held that rights in the ICCPR 'must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers and refugees'.²⁴⁸

The UNHCR holds firmly that human rights should be extended to refugees especially, since by definition they are refugees because they have been denied human rights:

Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safety and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum.²⁴⁹

²⁴⁶ UNHCR's Executive Committees' Conclusion No 81 op cit note 244.

²⁴⁷ The ICCPR guarantees all rights to everyone under its jurisdiction, except for rights such as vote and public office which are reserved for citizens. See also B C Nirmal 'Refugees and Human Rights' (2001), available at www.worldlii.org/int/journals/ISILYBIHRL/2001/6, accessed 9 March 2016.

²⁴⁸ UN Human Rights Committee 'General Comment No 31: The Nature of the Legal Obligations of the States Parties to the Covenant' (2004) UN Doc. HRI/GEN/1 May 12, 2004, at 192 para 10; See also A Kesby *The Right to have Rights, Citizenship, Humanity and International Law* (2012) Oxford University press: Oxford at 100; V Chetail & C Bauloz (eds) *Research Handbook On International Law And Migration* (2014) Edward Elgar Publishers: Cheltenham.

²⁴⁹ Statement made at the 50th session of the UN Commission on Human Rights (1994) Quoted in UNHCR *Human Rights and Refugee Protection, Part I: General Introduction* (1995) at 4.

Clearly, ensuring that refugees are not discriminated against and have access to human rights is crucial to their overall protection. However, the degree to which refugees can enjoy their rights depends on how well they are integrated in the host society.

3. MEMBERSHIP OF A NATIONAL COMMUNITY AS A PRECONDITION FOR THE EFFECTIVE PROTECTION OF REFUGEE RIGHTS?

Membership to a national or political community is a prerequisite to the effective protection of human rights. Solutions for refugees in protracted situations must therefore begin with this assumption. According to Aleinikoff and Poellot, refugees are *de facto* stateless persons and are, therefore, unable to benefit from the full range of human rights.²⁵⁰ They argued that one of the reasons behind the creation of the modern refugee regime was precisely to address the gap in human rights protection.²⁵¹ Coles has similarly contended that ‘possession of a national community is important to an individual because of the social nature of the human being and because of the indispensable role of such a community in human well-being, development and security of the individual’.²⁵² Arendt also made this point in *The Origins of Totalitarianism*: ‘[T]he fact of not having a nationality or not enjoying in practice the protection of a State places stateless persons, *de jure or de facto*, in a position of inferiority,

²⁵⁰ Aleinikoff & Poellot op cit note 233 at 207.

²⁵¹ See UN Ad Hoc Committee on Refugees & Stateless Persons *A Study of Statelessness* (1949) available at <http://www.unhcr.org/refworld/docid/3ae68c2d0>, accessed on 14 March 2015.

²⁵² G Coles ‘The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry’ in E Alan & Nash (eds) *Human Rights And The Protection Of Refugees Under International Law* (1988) The Institute for Research on Public Policy: Halifax at 205.

incompatible with the respect of human rights.’²⁵³ Arendt at the same time asserted that stateless persons lived in a ‘legal limbo’ and found that without a nationality, without attachment to a State or political community, human rights were worthless.²⁵⁴ Arendt may have been too pessimistic, but the distinction she drew between human rights and the rights of the citizen is important.

These arguments demonstrate the significance of the right to a nationality or political membership to the enjoyment of human rights by every person.²⁵⁵ It is thus unsurprising that refugees face challenges to the full enjoyment of their human rights in their host States.

According to Benhabib, there is a way out of the ‘lack of rights’ for refugees or stateless persons.²⁵⁶ Benhabib believes that Arendt’s ‘right to have rights’ can be placed on a more secure footing by re-conceptualising it in theoretical terms.²⁵⁷ Whereas for Arendt the right to have rights denotes a political right closely related to membership in a political community, Benhabib’s understanding is that it is sufficient for a person to be recognised as being ‘worthy of equal respect and equal protection’.²⁵⁸ Benhabib believes that the interest of the refugee can be guaranteed in ways other than the right to residence or nationality.²⁵⁹ She

²⁵³ Arendt op cit note 63 at 295: The conception of human rights . . . broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships — except that they were still human. The world found nothing sacred in the abstract nakedness of being human.

²⁵⁴ Arendt op cit note 63.

²⁵⁵ UDHR at Article 15.

²⁵⁶ S Benhabib ‘Borders, Boundaries and citizenship’ (2005) 38 *Political Science and Politics* 673.

²⁵⁷ Ibid at 673.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

believes that the dignity of the refugee is recognised by being afforded equal protection and equal respect.²⁶⁰

Benhabib's solution might be sufficient to protect refugees in need of temporary protection but not those in protracted refugee situations. The dignity afforded to human beings generally is not at the same level as the dignity granted to the citizen because of the superior relationship between the individual and the State that citizenship provides. Even for refugees who need temporary protection, it could be argued that Benhabib underestimates what it takes for non-citizens such as refugees to enjoy or have access to rights. Not only does it take extraordinary measures for the refugee to access the rights that are guaranteed to them on paper, as non-citizens, refugees cannot also enjoy the full range of human rights available to citizens.

According to Kant, the right to dignity vests in every human being irrespective of their status or rank.²⁶¹ He also asserts that a person cannot be stripped of their dignity; everyone is entitled to it irrespective of their actions, no matter how abhorrent. Kant therefore attaches dignity to humanity as such.²⁶² Kant also recognises role-related *dignitas*, but he brings the dignity that originates from humanity together with the role-related *dignitas* (e.g. aristocracy) by saying that 'no human being can be without a dignity because he at least has the dignity of a citizen'.²⁶³ Kant thus states that the dignity of a citizen is the one dignity to which every human being is entitled.²⁶⁴ This statement has important implications for refugees in protracted refugee situations. Such refugees do not have a citizenship; they are *de facto*

²⁶⁰ Benhabib op cit note 256 at 673.

²⁶¹ I Kant *The Metaphysics of Morals* Translated and Edited by Mary Gregor (1996) Cambridge University Press: Cambridge at 104.

²⁶² Currie & de Waal op cit note 65.

²⁶³ Kant op cit note at 261 at 104.

²⁶⁴ Ibid.

stateless and, consequently, are deprived of this form of Kantian human dignity, ‘dignity in citizenship’, as opposed to the abstract dignity of a human person.

According to Waldron, citizenship has become a sort of status that grants the bearer a certain dignity. This is evident from the fact that citizenship comes with a bundle of rights and privileges and is generally regarded as a positive status.²⁶⁵ Waldron believes that the right to dignity can extend equally to everyone because the status differences have largely been abandoned (slaves, nobility); hence, the concept of the universality of human rights. However, different legal statuses continue to exist; being a citizen is a legal status, being a refugee is a legal status, being a permanent resident is a legal status – we are not as Waldron²⁶⁶ or Vlastos,²⁶⁷ whom he quotes, like to believe, a single status system yet, we are not yet all ‘Brahmins’.²⁶⁸

Even though Waldron and Vlastos believe in a single status society, Waldron acknowledges that there are two types of status: sortal and conditional.²⁶⁹ Conditional statuses are the conditions individuals are in, it may not be forever, such as minors. Sortal statuses are relative to condition status. The idea behind sortal status is that there are different kinds of persons.²⁷⁰ Though hard to find today, it could be slaves or, during Apartheid, the victims of racist policy. Where do refugees fit here; at first instance it could easily be said that they are in a condition status, but a closer look will show that refugees in protracted situations are not, because it is a condition that they cannot come out of because of lack of solutions. They

²⁶⁵ J Waldron ‘Citizenship and Dignity’ (2013) *Public Law and Legal Theory Research Paper Series* 1–24.

²⁶⁶ Ibid.

²⁶⁷ G Vlastos ‘Justice and Equality’ in J Waldron (ed) *Theories Of Rights* (1984) Oxford University Press: Oxford at 54.

²⁶⁸ Ibid.

²⁶⁹ Waldron op cit note 265 at 242.

²⁷⁰ Ibid.

could very well be a sortal status, but this is precisely what the concept of human dignity denies. There are not different kinds of people; all people have 'legal citizenship'. According to Waldron, the shape of the principle of dignity is given the name of 'legal citizenship'. Waldron uses legal citizenship in a broad sense and not in the narrow technical sense of having a nationality of a particular country, more in the sense of equal access to rights. For everyone to have legal citizenship is clearly the ideal but there is no evidence that Waldron considered refugees in protracted refugee situations in his analyses.

In reality this is very different, and the treatment of refugees, in particular long-term refugees, and their exclusion from a national or political community will always make them the other. This permanent condition (condition status) of refugee hood thus impacts on their dignity and the only way they can benefit from the right to dignity is if the notion of citizenship is extended to them.

Botha states that in countries where we find refugees or other immigrants, citizenship often works as an *us vs them* concept, marking a contrast between a privileged class and a less privileged class, and it's valued by those who have it.²⁷¹ Botha finds that it remains the case even if most constitutional rights and human rights generally are accorded to non-citizens, as well as the fact that these rights are given in the spirit of citizenship.²⁷² However, it cannot be said that the dignity of the citizen merges with human dignity because the dignity of the citizen remains relational and specific.²⁷³ This is reinforced by the fact that citizenship connotes the quality of the relationship between a State and those subject to its power.²⁷⁴ If

²⁷¹ Botha op cit note 62.

²⁷² Ibid.

²⁷³ Vlastos op cit note 267.

²⁷⁴ Waldron op cit note 265.

everyone, therefore, has a State that is responsible for him or her, it may be a way of realising human dignity for everyone.

The United States Supreme Court has also described the right of citizenship as ‘the right to have rights’.²⁷⁵ In *Trop v Dulless* the US Supreme Court held that the loss of citizenship was a cruel and unusual punishment and nothing less than an offence to the ‘dignity of man’.²⁷⁶ The US Supreme Court helped answer the question of the relation between ‘dignity in citizenship’ and the ‘abstract human dignity’ that underpins human rights. It refers to the likely hardships of de-nationalisation and concluded that taking away citizenship is ‘the total destruction of the individuals’ status in an organised society’.²⁷⁷ The Court found that the dignity of man was offended by being made stateless.²⁷⁸

The ICESCR demonstrates that nationality or citizenship is important to the full enjoyment of human rights.²⁷⁹ This is the case because the extent to which socio-economic rights are granted to non-citizens by the ICESCR is left to the individual States, depending on their economic situation.²⁸⁰ There is thus no obligation to grant the same socio-economic rights to non-nationals. Socio-economic obligations are also subject to progressive realisation.²⁸¹

Even though the civil and political rights of the ICCPR extend to everyone, including refugees, Hathaway notes that the ICCPR often formulates rights on the basis of

²⁷⁵ *Trop v. Dulles* 356 US 86, 101–02 (1958) (Warren, C.J.).

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ F Marouf & D Anker ‘Socio-Economic Rights and Refugee Status: Deepening the Dialogue between Human Rights and Refugee Law’ (2009) 103 *American Journal of International Law* at 784.

²⁸⁰ ICESCR at Article 2 (3).

²⁸¹ ICESCR Article 2(2).

‘inappropriate assumptions.’²⁸² He cites the example that the guarantee of fairness in judicial proceedings does not address the more basic issue of access to courts.²⁸³ It must also be pointed out that political rights are generally not guaranteed to non-citizens and, as a result, refugees are generally not allowed to vote, contest for public office, or to be represented in democratic institutions, such as parliament.

In conclusion, membership to a political community is crucial to the enjoyment of human rights. Because refugees in protracted situations lack such membership for a long period of time, they cannot enjoy the full array of rights and hence their dignity is impaired. Restoring refugees’ membership to a political community demonstrates a commitment to human rights and is an important step to finding durable solutions to refugees in such protracted situations. The next question to be answered in this chapter is whether the host State has a duty in international law to provide membership to its political community to refugees in a protracted refugee situation.

4. THE UN REFUGEE CONVENTION AND REFUGEES IN PROTRACTED SITUATIONS²⁸⁴

²⁸² Hathaway op cit note 36 at 121.

²⁸³ Ibid.

²⁸⁴ Some of the standard works on the refugees include, A Grahl-Madsen *The Status of Refugees in International Law* vols 1&2 (1966 - 1972) A W Sijthoff: Leydon; G Goodwin-Gill *The Refugee in International Law* (1983) Oxford University Press: Oxford; G Jaeger *Status and International Protection of Refugee* (1978); P Macalister-Smith, *International Humanitarian Assistance : Disaster Relief Actions in International Law and Organization* (1985) Oxford University Press: Oxford; G Loescher & L Monahan *Refugees and International Relations* (1989) Oxford University Press: Oxford.

Provisions of the UN Refugee Convention have to be interpreted in the context of the whole Convention. One of the key provisions that provides guidelines to the analysis and interpretation of the Convention is Article 5, which provides that '[n]othing in this convention shall be deemed to impair any rights and benefits granted by a contracting State to refugees apart from this Convention'.²⁸⁵ This provision should be read as requiring governments to respect all the rights of refugees recognised in this treaty and other international human rights treaties.

Additionally, the UN Refugee Convention also grants more superior rights to refugees the longer they stay in the host State. According to Hathaway, the Convention 'grants *enhanced rights* as the bond strengthens between a refugee and the State party in which he or she is present'.²⁸⁶ At the lowest level, refugees are subject only to the jurisdiction of the host State, even though they are not physically present, such as on a boat carrying a State flag or on a national airline or in an embassy.²⁸⁷ The refugee is simply under the control of the host State and the refugees' safety is assured.²⁸⁸ Only two core rights are protected under this extra-territorial jurisdiction: the right not to be returned to harm²⁸⁹ and the right to non-discrimination.²⁹⁰

Furthermore, the UN Refugee Convention dictates the standard of treatment to be accorded to refugees as opposed to other aliens. It provides that refugees should either be

²⁸⁵ UN Refugee Convention at Article 5.

²⁸⁶ Hathaway op cit note 36 at 154.

²⁸⁷ *Abdi v Minister of Home Affairs* 2011 (3) SA 117 (SCA); *Amuur v France* (1996) 23 ECHR; *Riad and Idiab v Belgium* No 29787/03.

²⁸⁸ *Abdi & Amuur* ibid.

²⁸⁹ UN Refugee Convention at Article 33.

²⁹⁰ Ibid at Article 15.

treated as favourably as the ‘best alien’ or as ‘aliens generally’,²⁹¹ if they are in the same circumstances.²⁹² Some provisions of the UN Refugee Convention aim at providing special rights or benefits to refugees while other provisions recognise rights to refugees by comparison with citizens or non-citizens.²⁹³

In addition to defining a refugee,²⁹⁴ the UN Refugee Convention guarantees a bundle of rights to refugees that are aimed at providing them international protection that is broader than mere physical safety.²⁹⁵ The right to non-refoulement,²⁹⁶ together with a range of socio-economic and civil rights is all guaranteed to refugees. Some of these rights are subject to reservations, while others are not.²⁹⁷

Crucially, the UN Refugee Convention also provides for cessation²⁹⁸ of refugee status. One way to end refugee status is through re-availment to the country of origin. The refugee regains membership of the political and social community with full membership rights. Membership to a political community is precisely what refugees’ lack, no matter how many rights are guaranteed by the UN Refugee Convention. Refugees are unlike all other migrants

²⁹¹ Ibid at Article 7(1).

²⁹² UN Refugee Convention at Article 6.

²⁹³ Clark & Crepeau op cit note 242 at 393.

²⁹⁴ UN Refugee Convention at Article 1A.

²⁹⁵ Aleinikoff & Poellot op cit note 233 at 202.

²⁹⁶ UN Refugee Convention at Article 33.

²⁹⁷ These rights not subject to reservations include the right to non-discrimination (Article 3), the right to freedom on religion (Article 4), Right to non-refoulement (Article 33) the right to access to court (Article 16). Reservations and declarations to the 1951 Refugee Convention can be accessed at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20on%20vention>, accessed 12 July 2016. South Africa has not signed any reservations to the Convention.

²⁹⁷ UN Refugee Convention Article 1C.

²⁹⁸ Ibid at Article 1C.

who may return home and whose bond with their State and citizen is assured; refugees by definition cannot.

If return to the home State is not possible for refugees, the only way a refugee may become a member of a political community with full rights is if another State grants such rights. Hence, for prolonged exile to come to an end, such refugees must be considered for a durable solution other than voluntary repatriation and the only durable solution recommended by the UN Refugee Convention that meets the requirement of full membership to a community, are ‘assimilation and naturalisation’. However, as Feller has argued, ‘The UN Refugee Convention foreshadows various types of solutions, as refugee status is by definition temporary, but again envisages no special arrangements to ensure they are realisable in a timely and durable manner’.²⁹⁹ Refugees in protracted refugee situations are therefore an anomaly in international refugee law and, unfortunately, a solution to such long-term refugeehood is not readily available in the UN Refugee Convention, with the exception of Article 34, which will be discussed below.

5. ASSIMILATION AND NATURALISATION

5.1. Introduction

Article 34 is the closest that the Convention gets to a solution to prolonged refugeehood in a host State.

²⁹⁹ E Feller ‘Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come’ (2006) 18 *International Journal of Refugee Law* 509-525; See also G Goodwin-Gil & J McAdam *The Refugee In International Law* (2007) Oxford University Press: Oxford at 489.

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.³⁰⁰

Whereas the word naturalisation³⁰¹ has a distinct immigration status, assimilation does not. It is widely accepted that to be naturalised, one has to acquire the nationality of a political or a national community and that such a status is accompanied by various rights. It is also widely accepted that nationality can be acquired in various ways. Refugees in protracted situations can potentially acquire nationality by means of an application for naturalisation under Article 34, and thus end their prolonged refugee status.

Assimilation, on the other hand, does not have a clear legal meaning. At the drafting of the UN Refugee Convention,³⁰² the Israeli representative submitted that assimilation was a term ‘well-known in sociology [that] bore an unpleasant connotation vaguely related to the use of force’.³⁰³ ‘If assimilation was not voluntary’, he continued, ‘it would be an attack on the spiritual independence of the refugee’.³⁰⁴ Assimilationist policies are generally viewed in a negative sense because in its worst form a State could put extreme pressure on minorities to

³⁰⁰ UN Refugee Convention at Article 34.

³⁰¹ Nationality is usually conferred on a person at birth either because the person is born on a territory or because one or both of its parents possess the nationality in question. Nationality may also be conferred upon a person later by an application filed by the individual seeking to be naturalised. In the case of a refugee, this would largely be the case.

³⁰² P Weiss ‘Commentary of the 1951 UN Refugee Convention Travaux Prepatoire’ (1995) available at <http://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>, accessed on 22 October 2016 at 344.

³⁰³ Ibid.

³⁰⁴ Ibid.

relinquish their culture and adopt the culture of the State to ensure a homogenous national identity.³⁰⁵

Despite strong objections, the drafters retained the term, arguing that assimilation was not intended to be a term of compulsion, but to be used ‘in the sense that refugees became part of the national community, that they were not isolated in the country of refuge and that they understand the ways of the new national community so that they could be fit for naturalisation’.³⁰⁶ Commentators agree that the drafters intended assimilation to be understood in the sense of integration into the economic, social and cultural life of the host community without forcing refugees to forsake their own culture and way of life.³⁰⁷ The preferred term by the UNHCR today is ‘integration’ rather than ‘assimilation’. Integration allows the refugee access to a number of rights and privileges in the host State.³⁰⁸

Although assimilation and naturalisation may be two distinct processes, there is a nexus between them. The fact that assimilation/integration is mentioned first in Article 34 could be an indication that it is a process that is necessary before naturalisation can be facilitated. This is what Hathaway refers to it as a bifurcated approach,³⁰⁹ whereby local integration is treated as a prerequisite for naturalization. In fact, it has been identified as a process which could

³⁰⁵ S Brown & F Bean ‘Assimilation Models, Old and New: Explaining a Long-Term Process’ (2006), available at <http://www.migrationpolicy.org/article/assimilation-models-old-and-new-explaining-long-term-process>, accessed on 22 October 2016.

³⁰⁶ Weiss op cit note 302 at 344.

³⁰⁷ Ibid.

³⁰⁸ UNHCR Executive Committee Conclusion No 104 (LVI) on Local Integration (2005), UN GA Doc A/AC.96/1021, 7 October 2005.

³⁰⁹ Hathaway op cit note 36.

lead to permanent residence rights and, ultimately, the acquisition of citizenship by UNHCR.³¹⁰

The link between naturalisation and integration is especially important for refugees who, unlike other aliens, often lack an effective nationality and thus may be considered to be *de facto* stateless, a situation which is abnormal and should not be regarded as permanent.³¹¹ Thus, while facilitating the integration of newly recognised refugees is an independent obligation from naturalisation, it can be a stepping stone to naturalisation.

The fact that the UNHCR regards local integration as a durable solution for refugees even though it does not lead to ending refugeehood warrants an in depths analysis of the concept.

5.2. Assimilation: The Local Integration Approach

5.2.1. *What is Local Integration?*³¹²

According to the UNHCR, '[i]ntegration requires preparedness on the part of the refugees to adapt to the host society, without having to forego their own cultural identity. From the host society it requires communities to be welcoming and responsive to refugees, and public institutions that are able to meet the needs of the diverse population'.³¹³ Local integration has three specific dimensions – legal, economic, and socio-cultural.³¹⁴ In terms of the legal

³¹⁰ UNHCR Executive Committee Conclusion No 104 op cit note 308.

³¹¹ Grahl-Madsen op cit note 284.

³¹² L Hovil 'Local Integration' in E Fiddian-Qasmiyeh et al (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) Oxford University Press: Oxford; See also Crisp supra note 25.

³¹³ UNHCR 'Local Integration Global Consultations on International Protection' (2002) EC/GC/02/6 at para 14-17.

³¹⁴ Ibid.

dimension, refugees are granted durable residence with a progressively wider range of rights that are equivalent to those granted to its citizens. These rights include, amongst others, freedom of movement, access to the labour market, access to public relief and assistance, access to healthcare and education, the right to travel and identity documents as well as the right to family unity,³¹⁵ which ought to be sufficient to lead to the social and economic integration of refugees. Although local integration is touted as a durable solution, it can lead to protracted refugee situations if the end-product of local integration is not the termination of refugee status. Jacobsen identifies the refugee who has obtained permanent residence as someone who has *full* integration, as opposed to the refugee with *local* integration that may or may not lead to permanent residence. She states:

Paths to refugee integration vary widely. Some of the most common scenarios are described below. *Full integration* refers to refugees who are granted asylum, residency, and full and permanent membership status by the host government. Under these circumstances, refugees acquire the protection of the host State and enjoy the full range of economic, social, and civil rights accorded to permanent legal residents, including access to citizenship under the same terms as others. *Local integration* may take place when it is not safe for refugees to return home after a prolonged period in exile. In such cases, a host government may decide to allow refugees to integrate locally, in the first-asylum country. Local integration may or may not lead to permanent residence and eventual citizenship.³¹⁶

Hathaway's explanation of local integration is more precise. According to him, 'Local integration means in essence that a refugee is granted some form of durable legal status that allows him or her to remain in the country of asylum on an indefinite basis, and fully

³¹⁵ Ibid at para 6.

³¹⁶ Jacobsen op cit note 37.

participate in the social, economic, and cultural life of the host community’.³¹⁷ So conceived, he says, local integration is not really distinguishable from the primary solution envisaged by the UN Refugee Convention – simple respect for rights.

5.2.2. *Local Integration as a Durable Solution*

The UNHCR Executive Committee’s Conclusion on Local Integration³¹⁸ makes reference to local integration as one of three durable solutions for refugees. The other two are resettlement³¹⁹ and voluntary repatriation.³²⁰ These two are distinctly different from local integration because they signify the end of refugee status. Therefore, the UNHCR’s reference to local integration as a durable solution is problematic, especially in light of the fact that it acknowledges that it is distinct from naturalisation and that the refugee retains his or her status as a refugee.³²¹

Local integration without the possibility of termination of refugee status can thus lead to an anomalous situation of a permanent refugee status. Kant, in his theory, views citizenship as a sort of dignity; it is thus a status-term.³²² It is also evident that citizenship comprises a bundle of rights, powers, duties and liabilities and is generally regarded positively, whereas the term ‘refugee’ has never been regarded in a positive light.³²³ Refugee status is associated with various negative terms, such as burden-sharing,³²⁴ and signifies a lesser status. Unlike

³¹⁷ Hathaway op cit note 36.

³¹⁸ UNHCR Executive Committee op cit note 308.

³¹⁹ UNHCR Resettlement Handbook (2011) op cit note 44.

³²⁰ Op cit note 48.

³²¹ UNHCR Executive Committee op cit note 308.

³²² Kant op cit note 264 at 103.

³²³ Aleinikoff & Poellot op cit note 233.

³²⁴ Clark & Crepeau op cit note 242 at 408.

refugee status, citizenship is cherished, not only because it is associated with the rights, powers and responsibilities of a privileged class, but also because of the general quality of the relationship between the State and those subject to its power.³²⁵

It should also be noted that local integration is not an option for those countries that entered reservations to the UN Refugee Convention. The Convention allows for the reservation of a number of rights, except the right to non-discrimination, freedom to practice religion, access to court and non-refoulement.³²⁶ Reservations may thus be signed to the right to ‘assimilation and naturalisation’. The rights that reservations are allowed to are obviously much harder for the host State to grant to refugees because it imposes a duty on the State. Hathaway and Cusick have noted that a plain reading of the UN Refugee Convention demonstrates that the rights granted are not mere standards of achievement for States, but that they are enforceable against State parties and as such stated in the language of legal obligation.³²⁷ States that have not signed any reservations to the UN Refugee Convention are thus obliged to grant refugees these rights.

Local integration as envisaged by the UNHCR does provide a wide range of rights to refugees that can facilitate the refugees’ integration into the host community. According to the UNHCR, the range of the rights available ought to allow the refugee to live a meaningful life in the host State.³²⁸ The question to explore here is thus whether the range of rights

³²⁵ Waldron op cit note 268; See also M Koessler ‘Subject, Citizen, National, and Permanent Allegiance’ (1946) 56 *The Yale Law Journal* at 58-76.

³²⁶ UN Refugee Convention at Article 42 states: ‘1. At the time of signature, ratification or accession, any state may make reservation to the articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36 to 46 inclusive.’

³²⁷ J Hathaway & A Cusick ‘The Rights of Refugees are not Negotiable’ (2000) 14 *Georgetown Immigration Law Journal*.

³²⁸ UNHCR Executive Committee Conclusion No 104 op cit note 308.

offered to refugees in the UN Refugee Convention can adequately assist with the effective integration/assimilation of refugees in the host State ‘legally, socially and culturally’.³²⁹

5.2.3. Is the Availability of ‘Rights on Paper’ Sufficient for the Social, Legal, and Economic Integration of Refugees?

As shown in section 5.2.1 above, the UN Refugee Convention guarantees refugees a number of rights. According to Hathaway the socio-economic rights are, however, made available from a citizen’s perspective rather than a general human being perspective, which immediately puts refugees at a disadvantage.³³⁰ Similarly, Aleinikoff asserts that the ‘otherness’ of refugees hampers their access to and enjoyment of the given rights’.³³¹ While refugee rights are for the moral, social, and economic well-being of the refugee, they do not take away the stigma associated with the second-class status of being a refugee. As has been argued earlier, the rights, generous as they may be, cannot be fully enjoyed the refugees simply because they are refugees.³³²

For example, the UNHCR has said that for refugees to be able to live meaningfully in the host State, they have to enjoy the right to documentation, the right to work, the right to education, the right to a family, the right to shelter, freedom of movement, and the right to acquire and dispose of property.³³³ However, these rights can only be enjoyed if refugees are properly and expeditiously documented to enable them to acquire or enjoy the rights offered.

³²⁹ UNHCR Executive Committee Conclusion No.104 op cit note 308.

³³⁰ Hathaway op cit note 36.

³³¹ Aleinikoff & Poellot op cit note 233.

³³² Botha op cit note 62.

³³³ UNHCR op cit note 308.

Irrespective of which country refugees find themselves in, the immediate issuance of documentation is vitally important so that refugees are not vulnerable to arrest or deportation.³³⁴ The consequences are harsh for refugees if they lack identification documentation. They may not be allowed to enroll for education, be eligible for employment, open a bank account or acquire property.³³⁵

The UN Refugee Convention³³⁶ makes provision for the issuance of identity documents, but there is no guarantee the documentation issued by the host State to the refugee will sufficiently allow for their legal, social, and economic integration. The UN Refugee Convention does not require the identity document to have any form or serve any purpose other than for the refugee to identify him or herself.³³⁷ Neither is it required to be a rights-bearing document. In many countries, identity documents serve as residence permits or proof of domicile. However, there is no indication that identity documents for refugees must be in the same form or serve the same purpose as those identity documents issued to citizens.³³⁸

According to Amit and Krigler the refugee identity document has thus not proven to be an enabling document. The clear distinction between the identity document for refugees and the identity document for the citizen has negatively impacted on the rights of the refugee.³³⁹

³³⁴ R da Costa 'The Rights of Refugees in the Context of Integration: Legal Standards and Recommendations.' (2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=44bb90882&query=rosa%20costa> accessed on 15 March 2016.

³³⁵ Ibid.

³³⁶ UN Refugee Convention at Article 27 states: The contracting State shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

³³⁷ Da Costa op cit note 334.

³³⁸ R Amit & N Krigler 'Making migrants "il-legible": The Policies and Practices of Documentation in Post-Apartheid South Africa' (2014) 40 *Kronos* at 269–290.

³³⁹ Ibid.

Refugees in protracted refugee situations, in particular refugee identity documentation serves as an obstacle to full access to their rights.

In addition to being documented, it is also vitally important for refugees in protracted refugee situations to access socio-economic rights. Such access to socio-economic rights assures refugees of their dignity by giving them a sense of belonging and the tools to cope economically and socially in the host State.

Most important amongst these socio-economic rights is the right to work. Despite the recognition of the right to work in the UN Refugee Convention,³⁴⁰ refugees face many obstacles to finding work.³⁴¹ It is obvious that the drafters considered the right to work as an important right in the integration of refugees.³⁴² If properly implemented, this right can facilitate the economic and social integration of refugees in the host State by enabling refugees to become self-reliant and make a positive contribution to their host communities.³⁴³ The South African Supreme Court of Appeal in *Watchenuka* held that the right to work is an essential element of human dignity³⁴⁴ and crucial to achieving economic self-sufficiency.

This right to work also has the potential to lead to a durable solution for refugees. In many jurisdictions, including South Africa, continuous employment for a number of years allows for the immigrant to become eligible to apply for permanent residency.³⁴⁵ Although the UN

³⁴⁰ UN Refugee Convention.

³⁴¹ Da Costa op cit note 334.

³⁴² Ibid.

³⁴³ A Ager & A Strang 'Understanding Integration: A Conceptual Framework' (2008) 21(2) *Journal of Refugee Studies* at 166 – 191; See also R Zetter & H Ruaudel 'Refugees' Right to Work and Access to Labour Markets – An Assessment' KNOMAD Working Paper and Study Series, available at http://www.knomad.org/docs/forced_migration/20Assessment.pdf, accessed on 22 October 2016.

³⁴⁴ *Watchenuka* supra note 67. Hereafter referred to as *Watchenuka*.

³⁴⁵ Immigration Act 13 of 2002, section 26.

Refugee Convention does not expressly state that refugees can become eligible for permanent residence after continuous work for a number of years, this right is critical to the economic and social integration of refugees.³⁴⁶

Equally important to the integration of refugees is the right to education. International human rights instruments are both wider and more generous than the UN Refugee Convention with regard to the right to education. The minimum core has been defined by commentators on Article 13 of the ICESCR³⁴⁷ as including the right to equal access to public education institutions, free compulsory primary education, free choice of education without interference and the right to be educated in the language of one's choice. Similarly the Convention on the Rights of the Child³⁴⁸ specifies that primary education must be free. The UN Refugee Convention at Article 22³⁴⁹ does not make 'lawful stay' a requirement of access to education and must thus be interpreted as allowing asylum seekers to have access to public education. It would naturally be difficult for refugees to integrate without enjoying the right to education. Once again, access to this right is hindered because refugee documentation is generally issued for short periods.³⁵⁰

The UN Refugee Convention also places an obligation on the contracting State in Article 26 to allow refugees freedom of movement and the freedom to choose a place to stay.³⁵¹ Refugees need to be able to move freely in the country of asylum if they want to access the

³⁴⁶ UNHCR Executive Committee Conclusion No 104 op cit note 308.

³⁴⁷ See CESCR General Comment No 13: The Right to Education (Article 13) Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (Contained in Document E/C12/1999/10).

³⁴⁸ UN General Assembly Convention on the Rights of the Child (1989) 1577 UNTS 3.

³⁴⁹ UN Refugee Convention at Article 22.

³⁵⁰ Da Costa op cit note 334.

³⁵¹ UN Refugee Convention at Article 26.

rights which are key to their ‘functional integration’, as referred to by Da Costa,³⁵² or their ‘structural integration’, as referred to Bloch,³⁵³ to be able to become self-reliant. The restriction to freely choose a place of residence can be detrimental to the social well-being of refugees who would generally choose to live with established refugee communities or areas of the host country.

Unfortunately, refugees are treated differently from other foreign nationals and in some countries, refugees are detained for long periods.³⁵⁴ In other countries refugees are even restricted to certain areas in the country.³⁵⁵ The refusal to suitably document refugees can of course severely hamper their right to freely move in the country of asylum and, therefore, integrate in a meaningful way. Unless these rights are exercised generously refugees in protracted refugee situations cannot benefit therefrom.

The UN Refugee Convention at Article 13 requires the refugees’ right to acquire property to be the same as ‘for aliens generally’.³⁵⁶ Ownership of especially immovable property is a

³⁵² A Bloch ‘Refugee Settlement in Britain: The Impact of Policy on Participation.’ (2000) 26 *Journal of Ethnic and Migration Studies* at 75–88.

³⁵³ Ibid; Da Costa op cit note 334.

³⁵⁴ S Fleet ‘Mandatory Detention of Asylum Seekers in Australia’ (2007) 7 *Illawarra Unity* at 40-46; S Kneebone ‘The Pacific Plan: The Provision of ‘Effective Protection?’ (2006) 8 *International Journal of Refugee Law* at 696-721. Kneebone’s article looks at whether Australia’s Pacific Solution provides effective protection to asylum seekers and concludes that effective protection is not provided, in particular in relation to processing arrangements. See Also Z Silove et al ‘Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development’ (2001) 357 *The Lancet* at 1436-1437.

³⁵⁵ V Pop ‘Asylum Seeker’s Freedom of Movement can be Suspended’ *Wall Street Journal* 1 March 2016, available at <http://www.wsj.com/articles/asylum-seekers-freedom-of-movement-can-be-suspended-eu-rules-1456829611>, accessed on 22 October 2016.

³⁵⁶ UN Refugee Convention at Article 13 states: Movable and Immovable Property: The contracting state shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded

strong indication of the need for a durable stay in the country of refuge. The ability to acquire immovable property, therefore, is an important right for long-stay refugees. State parties have an obligation to facilitate the integration of refugees, allowing refugees to establish themselves, but the right to acquire property significantly impacts on their right to an adequate standard of living. Insofar as the UN Refugee Convention allows for refugee ownership of immovable property, it makes it possible for the host State to create favourable conditions for the continued and long-term presence of refugees; this right is therefore useful for a refugee in a protracted situation in that it gives the refugee a sense of permanence. However, if a refugee is not issued enabling documentation or is unable to access suitable work opportunities, then the right to acquire property becomes meaningless.

The UNHCR in its Conclusion on Local Integration has also identified the right to family unity or reunification as important, even though it is absent from the UN Refugee Convention, because it ‘recognizes that family members can reinforce the social support system of refugees, and in so doing, promote the smoother and more rapid integration of refugee families.’³⁵⁷ However, Jastram and Newland found that refugees struggle to have family members join them or have their family recognised as refugees and in some countries there is still a lack of information or awareness of State responsibilities in this respect.³⁵⁸

to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

³⁵⁷ Op cit note note 311.

³⁵⁸ K Jastram & K Newland ‘Family Unity and Refugee Protection’ (2001), available at <http://www.unhcr.org/3bd3d4a14.pdf>, accessed on 16 February 2017.

5.2.4. *Conclusion*

This brief analysis of the above-mentioned rights clearly demonstrates that in spite of the UNHCR's recognition of local integration as a durable solution, it is as Hathaway stated 'no more than mere respect for Convention rights' and therefore sufficient for refugees in the short-term but inadequate for refugees in prolonged exile. The above analysis has also highlighted that despite the existence of these rights, States are struggling to implement it in manner that will ensure an effective and meaningful existence of the refugee in the host State. Local integration cannot be deemed to be a solution for refugees in prolonged exile, firstly because it is unfair to expect refugees to live their entire lives as 'the other'. Secondly, local integration, as envisaged by the UNHCR, does not end refugee status. Such refugees would be *de facto* stateless refugees and there is a strong possibility of their refugee children born in exile becoming stateless. Thirdly, the UN Refugee Convention may have correctly identified these rights as necessary for integration, but these rights have in some instances been so vaguely put forth in the UN Refugee Convention, that whilst sufficient to cater for new refugees, they will be insufficient for the refugee in a protracted situation. These rights also do not extend equally to refugees.

5.3. **Naturalisation**

The previous section dealt with the assimilation or integration of refugees in the host State and showed that assimilation on its own cannot end refugee status, but it can be a step to naturalisation. This section analyses the concept of naturalisation under the UN Refugee Convention and addresses the question whether it adequately caters for the refugees in a protracted situation.

5.3.1. *Definition and Implications*

Naturalisation is the legal act or process by which a non-citizen in a country may acquire citizenship or nationality of that country. According to Manby, the terms nationality and citizenship may be used interchangeably today,³⁵⁹ but they used to be two distinct concepts in South Africa during Apartheid.

In African countries under colonial rule or South Africa under apartheid, only those of European descent had both nationality and full citizenship rights. Similarly, it used to be common for women to have nationality of a state but not full citizenship, because they did not have the right to vote. Today, human rights law principles of non-discrimination require that all those who are nationals of a state enjoy the same rights.³⁶⁰

It is beyond doubt that citizenship symbolises the strongest bond between the State and the holder.³⁶¹ In *Nottebohm*, the International Court of Justice said ‘[a]ccording to the practice of States, to arbitral and judicial decisions, and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties’.³⁶² Citizenship provides the holder with specific rights, such as the right to diplomatic protection when outside the country, the right to hold political office and vote, that is, rights which are

³⁵⁹ The terms are used interchangeably in this thesis.

³⁶⁰ B Manby *Citizenship Laws in Africa, A Comparative Study* 3 ed (2016) African Minds: New York.

³⁶¹ CESCR op cit note 347.

³⁶² *Nottebohm Case (Liechtenstein v Guetamala)* ICJ (1955) ICJ Reports 23.

not available to non-citizens.³⁶³ This thesis has also demonstrated that the citizen is generally treated better than the non-citizen.³⁶⁴ It is obvious that granting citizenship is a prerogative of the State.³⁶⁵ Citizenship is indisputably the most durable form of solution for a refugee in a protracted refugee situation. It ends refugee status and it allows the refugee to be part of a national community. Refugees may be granted various rights in the spirit of citizenship by hosts' States, but the lack of citizenship means that they will remain vulnerable.³⁶⁶ From a legal point of view, citizenship for the refugee not only represents the right to full legal and diplomatic protection from a State, both within and outside the country, but it also indicates a commitment to the State on the part of the refugee.³⁶⁷

Whilst the UN Refugee Convention does not enshrine an absolute right of residence and, in fact, the enjoyment of most of its provisions is conditional on the immigration status of the refugee, the notion of permanence is not alien to the UN Refugee Convention.³⁶⁸ The notion of permanence for refugees may be slowly emerging and perhaps not yet institutionalised, but it was already postulated by Grahl-Madsen³⁶⁹ when he examined the plight of refugees without a country of origin, that is, stateless refugees. He argued that when the State is unable to remove a refugee, he gains freedom of movement and residence, he must be considered to

³⁶³ T Huddleston & M Vink 'Membership and/or Rights? Analysing the Link between Naturalisation and Integration Policies for Immigrants in Europe' (2013), available at <http://www.eui.eu/RSCAS/Publications/>, accessed on 22 October 2016.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Da Costa op cit note 334.

³⁶⁷ Ibid.

³⁶⁸ Hathaway op cit note 36 at 171-90 (detailing the various rights protections available to refugees at different levels of attachment).

³⁶⁹ A Grahl-Madsen *A Commentary on the Refugee Convention 1951 Articles 2-11, 13-37* (1997) Division of International Protection of the United Nations High Commissioner for Refugees.

be ‘lawfully staying’ in the territory such that ‘after a number of years (normally about three years) his interest in growing roots must override any other considerations’.³⁷⁰ Grahl-Madsen argued that it ‘has never been envisaged that there should be any group of underprivileged refugees, subject to the whims of the authorities’.³⁷¹

In short, a refugee who has stayed uninterrupted in a host State for a considerable time acquires a legitimate expectation to be treated fairly, including applying for naturalisation. This type of approach is consistent with Article 34, which provides for assimilation and naturalisation. This Article is the closest the UN Refugee Convention comes to ending refugee status in the host country.³⁷²

Even though the duty Article 34 imposes on States is merely to facilitate assimilation and naturalisation, not an unqualified duty on the host State to end refugee status, States cannot ignore it.

5.3.2. States’ Obligations in Relation to Naturalisation

As noted earlier, Article 34 of the UN Refugee Convention provides that States ‘shall as far as possible facilitate the assimilation and naturalization of refugees’. The use of the word ‘shall’ suggests that a duty is imposed on the State.³⁷³ However, this duty is qualified by the words ‘as far as possible’. The State can decide whether it is possible for it to naturalise any individual or any number of refugees.³⁷⁴ The decision by the State must, however, be guided

³⁷⁰ Grahl-Madsen op cit note 369.

³⁷¹ Ibid.

³⁷² UN Refugee Convention at Article 34.

³⁷³ C Botha *Statutory Interpretation: An Introduction for Students* 3 ed (1997) Juta & Co. Ltd: Cape Town at 67: ‘shall’ is deemed to be mandatory.

³⁷⁴ Huddleston & Vink op cit note 363.

by the well-known principle of good faith. As a result, States cannot simply ignore a provision in an international legal instrument that they have ratified.³⁷⁵ For instance, if a State refuses to assimilate or naturalise a refugee simply because it is unwilling, this would be a violation of the Convention.³⁷⁶

Once the State has made the decision to allow for the naturalisation of refugees, the State *must* abide by the other requirements of Article 34, namely, to ‘expedite’ naturalisation proceedings and to ‘reduce the cost’ of naturalisation. Unlike the duty to provide for naturalization, the duty to expedite and reduce the costs of naturalization is framed without qualification. These unqualified duties are especially necessary because refugees generally do not enjoy all their rights due to their status. In many countries, naturalization procedures involve long waiting periods, which is contrary to what Article 34 expects of States.³⁷⁷

The UNHCR has explained the duty to facilitate naturalisation as follows:

To ‘facilitate’ naturalization means that, refugees and stateless persons should be given appropriate facilities for the acquisition of the nationality of the country of asylum and should be provided with the necessary information on the regulations and procedures in force. Furthermore, it implies that national authorities should adopt legal or administrative procedures for the benefit of refugees by which they are enabled to qualify for naturalization earlier than aliens generally, they are not

³⁷⁵ See *The North Atlantic Coast Fisheries Case (Great Britain v United States of America)* (Award) [1910] XI RIAA 169 at para 188.

³⁷⁶ However, the UN Refugee Convention does not establish an interstate supervisory body to hold States accountable if and when they fail to meet their internationally defined protection obligations. See J Hathaway et al ‘Introduction’ (2013) 26 *Journal of Refugee Studies* at 323–326.

³⁷⁷ Grahl-Madsen op cit note 369.

required to give evidence of loss of their former nationality and that the fees normally paid for naturalization proceedings are reduced or waived.³⁷⁸

It is thus implied that States should, in addition to expediting the procedures and reducing costs, also reduce *legal obstacles* to applying for naturalisation generally. Many States require applicants for naturalisation to prove, among other things, that they are of good character.³⁷⁹ Some States may even require applicants to provide proof of their former nationality or professional qualifications. States are expected by Article 34 to reduce the burden on the refugee and relax such onerous requirements. The treatment of refugee applicants for naturalisation, according to Hathaway, should be in line with the treatment for the ‘most favoured alien’.³⁸⁰

5.3.3. *Length of Legal Sojourn Before Acquiring Nationality*

Article 34 does not recommend a time period that a refugee must spend in the host State before he or she becomes eligible for naturalisation. However, this issue was raised by the drafters, according to the *travaux preparatoires*.³⁸¹ It was recommended by the Canadian representative that the period from initial displacement before formal refugee status is granted must be taken into account,³⁸² and that the refugee’s stay in the host country must be

³⁷⁸ UNHCR ‘Positive Steps Forward in the Field of Citizenship’ (2006), available at <http://www.unhcr.ba/press/2006pr/030806.htm>, accessed on 22 October 2016.

³⁷⁹ The South African Example is outlined at chapter six.

³⁸⁰ Hathaway op cit note 36.

³⁸¹ Weiss op cit note 302.

³⁸² Weiss op cit note 302.

uninterrupted before the refugee can be eligible for naturalization.³⁸³ The Italian government objected to the naturalisation of refugees who have just entered a country, arguing that such action might ‘embitter the internal situation’ or cause ‘the gravest concern to over-population and unemployment’.³⁸⁴ The French representative submitted that the duty to ‘expedite the proceedings’ should not apply to the period of residency prior to application for naturalisation.³⁸⁵ In the end, the draft committee agreed not to include a specific time period within which to obligate states to allow for naturalisation.³⁸⁶ Article 34 thus recommends naturalisation without giving an indication of the length of sojourn in the host State for a refugee to become eligible to make such an application.

A possible way for individual States to address this issue is to apply the principle of non-discrimination that exists in international human rights law and is probably also available in the national laws of most countries.³⁸⁷ As stated above, according to the immigration laws of many States, foreigners become eligible for permanent residence or naturalisation after a period of uninterrupted stay in a host State. Refugees ought to be placed in a better position than ordinary immigrants because of their particular vulnerabilities and a large number of countries have reduced the time period for refugees to become eligible to apply for naturalisation.³⁸⁸ This type of approach might prevent protracted refugee situations.

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ See also Grahl-Madsen op cit note 369.

³⁸⁶ Weiss op cit note 302.

³⁸⁷ See chapter six for an explanation of the applicability of the principle of non-discrimination for refugees.

³⁸⁸ In 1969, the Council of Europe recommended to all members that refugees be subject to a minimum period of residence that does not exceed five years. In current German law for instance, the residency requirement may be reduced from the normal 8-year period to 6 years in the case of refugees. In Kenya, for example, naturalised citizenship can be acquired after only five years of residence and in Rwanda five years. Weiss, op cit note 302,

5.3.4. *Conclusion*

Notwithstanding that the duty to facilitate naturalisation is qualified by the phrase ‘as far as possible’, Article 34 is binding on States. Article 34 is clearly breached where a State party does not allow refugees to secure their citizenship, and refuses to provide a ‘cogent explanation for that inaccessibility’. It is incumbent on State parties, at the very least, to provide a good faith justification for excluding refugees from naturalisation.³⁸⁹

6. SOLUTIONS FOUND ELSEWHERE IN INTERNATIONAL LAW

6.1. The OAU Refugee Convention

The OAU Refugee Convention does not expressly refer to the issue of naturalisation, but Article II, which states that member States must ‘use their best endeavours to secure the settlement’ of refugees, which could be interpreted as an implied obligation on States to provide a secure residence for refugees.³⁹⁰ Furthermore, by virtue of its recognition of the UN Refugee Convention,³⁹¹ Article 34 of the latter also becomes applicable to African States. It

notes that at the time Denmark reduced the requirement from seven to six years in the case of refugees, in Belgium from six to three years, and in the Netherlands from five to four years. He also writes that some states reduce other hurdles to naturalisation, such as exempting refugees from the requirement to renounce dual-nationality in Switzerland and Finland. In Denmark, the language and integration requirements are relaxed for refugees.

³⁸⁹ Weiss op cit note 302 at 989.

³⁹⁰ Manby op cit note 360; 1969 OAU Refugee Convention at Article II.

³⁹¹ Article VIII (2) of the OAU Convention.

must be noted, however, that some African States have entered reservations to Article 34 of the UN Refugee Convention.³⁹²

With regard to durable solutions, it is evident that voluntary repatriation has always been regarded as the most desirable solution in Africa.³⁹³ However, according to Rutinwa, the other solutions, particularly local integration, were given greater significance than is generally acknowledged.³⁹⁴ In the preamble of the Recommendations (IV) of the Conference on the Legal, Economic and Social Aspects of African Refugee Problems (1967),³⁹⁵ voluntary repatriation was expressly said to be ‘the best solution to refugee problems’. However, in the same recommendations the conference also observed:

Considering that whilst the voluntary repatriation of refugees to the country of origin should be emphasized as the ideal solution of the refugee problem, it is nevertheless necessary to promote, for those refugees who do not wish to repatriate in the foreseeable future, a durable solution in the country of asylum, with a view to integrating them in the new country from an economic, social and legal point of view.³⁹⁶

³⁹² Botswana, Malawi, Mozambique have all signed reservations to Article 34 of the UN Refugee Convention.

³⁹³ Rutinwa op cit note 79.

³⁹⁴ Rutinwa op cit note 79.

³⁹⁵ United Nations ‘Economic and Social Council: United Nations. Economic Commission for Africa’ (1969-01). Report of the conference on the legal, economic and social aspects of African refugee problems, available at <http://repository.uneca.org/handle/123456789/17552>, accessed on 15 March 2016.

³⁹⁶ Ibid.

Similarly, at the Arusha Refugee Conference (1979),³⁹⁷ repatriation and local integration were given almost equal importance.³⁹⁸ The conference noted the provisions of the OAU Refugee Convention's Article V concerning voluntary repatriation and stressed the importance of voluntary repatriation as a solution to refugee problems. At the same time, the conference noted the provisions of Article 34 of the UN Refugee Convention concerning naturalisation of refugees and stressed the importance of naturalisation as a solution for African refugee problems in cases where voluntary repatriation can no longer be envisaged and where refugees have attained a sufficient degree of integration in their country of asylum.³⁹⁹

It is evident that African States considered the naturalisation of refugees before and after the drafting of the OAU Refugee Convention in 1969 as a solution in cases where voluntary repatriation is not appropriate.

7. BURDEN-SHARING AND REFUGEES IN PROTRACTED SITUATIONS

³⁹⁷ Recommendations from the Pan-African Conference on the Situation of Refugees in Africa, Arusha (Tanzania) Adopted at the Pan-African Conference on the situation of refugees in Africa in Arusha, 7-17 May 1979.

³⁹⁸ L G Eriksson et al 'The Recommendations from the Arusha Conference on the African Refugee Problem: An Analysing Account of the Conference on the African Refugee Problem' (1979) 20 *The Journal of Modern African Studies* at 350-352.

³⁹⁹ Eriksson op cit note 398.

Seeking solutions is one of the UNHCR's main functions, and States are explicitly called upon in Article 35⁴⁰⁰ of the UN Refugee Convention to provide the UNHCR assistance so that it can carry out its functions effectively. The importance of finding durable solutions is also made clear in the first paragraph of the UNHCR's founding statute,⁴⁰¹ which states that the High Commissioner shall assume the functions of 'providing international protection [to refugees] ... and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, or their assimilation within the new national communities'.⁴⁰²

Before the UN Refugee Convention, the first General Assembly (GA) resolution addressing refugees stated that a new international refugee body must consider solutions for refugees in addition to protecting them from non-refoulement.⁴⁰³ The need to find solutions has been confirmed in subsequent GA resolutions adopted after the UN Refugee Convention. Shortly after World War II, the GA committed member states to finding durable solutions. It stated: '... we commit ourselves to safeguarding the principle of refugee protection and to upholding our responsibility in resolving the plight of refugees, including through the support

⁴⁰⁰ Article 35 of the UN Refugee Convention provides: 'The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations, which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'

⁴⁰¹ Statute of the Office of the United Nations High Commissioner for Refugees GA Resolution 428(V), Annex, I.1, UN Doc A/RES/428(V) (1950) available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=a/res/428\(V\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=a/res/428(V)), accessed on 14 March 2016. Hereinafter referred to as UNHCR Statute.

⁴⁰² UNHCR Statute op cit note 401.

⁴⁰³ Aleinikoff & Poellot op cit note 233.

of efforts aimed at finding durable solutions for refugees in protracted situations⁴⁰⁴

The need to find solutions has also been confirmed in several UNHCR Conclusions.⁴⁰⁵ At the beginning of the Arab Spring, the UNHCR committed itself to securing solutions, explaining that ‘international protection of refugees is a dynamic and action-oriented function that is at the core of the mandate of the Office of the High Commissioner and that it includes - the ensuring of durable, protection oriented solution’.⁴⁰⁶

In the case of protracted refugee situations the UNHCR has identified the international law concepts of burden-sharing and international solidarity as a means to providing solutions for refugees in protracted refugee situations. The concept of burden-sharing can be found in the preamble of the UN Refugee Convention⁴⁰⁷ as well as in the 2009 Conclusion on Protracted Refugee Situations.⁴⁰⁸ Various other Conclusions have reiterated the view that solutions can be found for refugees in protracted situations by means of cooperation between states and the UNHCR.⁴⁰⁹

⁴⁰⁴ International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees GA Res 1166 (XII), UN Doc A/RES/1166 (XII) 1(a) 2 (Nov 26 1957), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1166\(XII\)&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1166(XII)&Lang=E&Area=RESOLUTION) accessed on 14 March 2016.

⁴⁰⁵ UNHCR Executive Committee Conclusion No 104 op cit note 308.

⁴⁰⁶ Office of the United Nations High Commissioner for Refugees GA Res 65/194, 20, UN Doc A/RES/65/194 (Feb 28 2011), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/res/65/194 UNHCR, accessed on 14 March 2016.

⁴⁰⁷ See UN Refugee Convention at preamble.

⁴⁰⁸ The 2009 UNHCR ExCom Conclusion op cit note 21.

⁴⁰⁹ UNHCR’s Executive Committee has highlighted the importance of burden-sharing. See UNHCR Executive Committee Conclusion No 85 (XLIX)-1998 on International Protection, UN GA Doc A12 A/53/12/Add.1, 9 October 1998 (Reiterating that refugee protection is primarily the responsibility of States and that it is best achieved through effective cooperation between all States and the UNHCR).

Several other Conclusions mention international solidarity.⁴¹⁰ Most recently, UNHCR's Executive Committee issued a statement reaffirming 'commitment to the principles of international solidarity and burden-sharing, in supporting host countries and in responding to the assistance needs of refugees and the communities hosting them' and calling upon the international community to share the burden of countries that are hosting Syrian refugees.⁴¹¹ As Fellers has said, 'refugee protection is a global concern and a common trust', which means that responsibility for it is shared, not individual.⁴¹²

The OAU Refugee Convention mentions burden-sharing specifically in its preamble where it calls for international co-operation to 'solve the problems of refugees in Africa' and in Article II (4) where it expressly states:

where a member-State finds difficulty in continuing to grant asylum to refugees, such members State may appeal directly to other member states and through the OAU, and such other member

⁴¹⁰ Executive Committee Conclusions 22, 29, 33, 41, 89, 95 reiterate the importance of burden-sharing.

⁴¹¹ Since adopting UNHCR's Statute, the General Assembly has continued, from the 1950s until today, to reiterate the urgency and importance of UNHCR's mandate to provide solutions. See eg International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees GA Res 832 (IX), U.N. Doc.A/RES/832(IX)1(Oct.21,1954), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/832\(IX\)&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/832(IX)&Lang=E&Area=RESOLUTION), accessed on 14 March 2016. (finding that UNHCR must 'in accordance with this Statute, to undertake a programme designed to achieve permanent solutions ...').

⁴¹² UNHCR Executive Committee Report of the Sixty-fourth Session of the Executive Committee of the High Commissioner's Programme, Annex 1, UN Doc A/AC/96/1132 (Oct 9 2013), available at http://www.unhcr.org/525b_aeae9.html, accessed on 15 March 2016; UNHCR Sixty-first Session of the Executive Committee of the High Commissioner's Programme, Agenda Item 5(a), at 1 (Oct. 6, 2010) (statement of E Feller, Assistant High Commissioner concerning Protection: Rule of Law 60 Years On), available at <http://www.unhcr.org/4cac7f2f9.pdf>, accessed on 14 March 2016.

States appeal directly to other member-states and through the OAU, and such member state shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the member-state granting asylum.⁴¹³

As is the case with other treaties that provide for international co-operation, this is rather vague, probably unenforceable, and has not been used in practice. The law has, however, been expressed. Co-operation between States has worked in both the European Union and Latin America and has legal and practical relevance.⁴¹⁴

Refugees in a protracted situation could benefit from the international solidarity or burden-sharing commitments promised by the international community in international law by providing durable solutions. However, burden-sharing or international solidarity depends on State cooperation and diplomatic good offices.

So far, the UNHCR has understood international solidarity and burden-sharing as requiring States to take ‘action with a view that burden-sharing should be directed towards facilitating voluntary repatriation, promoting local settlement in the receiving country, and providing resettlement opportunities in third countries as appropriate’.⁴¹⁵ Accordingly, the UNHCR has regarded resettlement⁴¹⁶ as an expression of international solidarity and a solution to protracted refugee situations. Resettlement has, however, come under harsh criticism because it is generally seen as being used by countries that do not want to receive

⁴¹³ 1969 OAU Convention at Article II (4).

⁴¹⁴ P Schuck ‘Refugee Burden-Sharing: A Modest Proposal’ (1997) 1 *Yale journal of international law* at 272.

⁴¹⁵ Para IV (1) UNHCR Protection of Asylum-Seekers in Situations of Large-Scale Influx, Excom Conclusion no 22 (1981).

⁴¹⁶ UNHCR Resettlement Handbook (2011) op cit note 44 at page xi.

asylum seekers directly. According to Treoller, resettlement is used by States ‘as an alibi for protectionist migration policies and not for humanitarian or solidarity reasons’.⁴¹⁷

However, resettlement remains a useful tool for international solidarity and burden-sharing.⁴¹⁸ The US State Department has expressed its support for the resettlement of refugees in protracted refugee situations identified by the UNHCR and have resettled many refugees in protracted situations in the US.⁴¹⁹ Whatever the underlying political reasons may have been, resettlement has been effectively used in the past to provide protection to large numbers of refugees in protracted refugee situations.⁴²⁰

Another example of international solidarity was when the international community took action through the Comprehensive Plan of Action developed by the UNHCR to address the crises of the Vietnamese Boat. In 1979, during the Indo-Chinese conflict, some Southeast Asian States were reluctant to receive the ‘Vietnamese Boat Refugees’ and this caused humanitarian and political crises. Some Western States assumed responsibility to receive refugees from countries of first asylum, which made the Southeast Asian countries stop their pushbacks.⁴²¹ Over one million refugees were resettled to Western States through this programme.⁴²² The UNHCR has also devised several other comprehensive plans to assist

⁴¹⁷ G Treoller ‘UNHCR Resettlement: Evolution and Future Direction’ (2002) 14 *International Journal of Refugee law* at 92.

⁴¹⁸ N Zucker ‘Refugee Resettlement in the United States: Policy and Problems’ (1983) 467 *The Annals of the American Academy of Political and Social Science* 172-186

⁴¹⁹ Protracted Refugee Situations - US Department of State, available at www.state.gov › ... › Policy Issues › Policy Issues, accessed on 22 October 2016.

⁴²⁰ UNHCR Resettlement Handbook (2011) op cit note 44.

⁴²¹ A Hurwitz *The Collective Responsibility Of States To Protect Refugees* (2009) Oxford University Press: Oxford at 144-146

⁴²² A Betts ‘Comprehensive Plan of Action: Insights from CIREFCA and the Indochinese CPA’ (2006) Working Paper No 20 at 32.

refugees identified by them to be in a protracted situation. In 2008, the UNHCR, through its special initiative on protracted refugee situations, proposed that the UNHCR and States work together to resolve five situations where refugees had been living in exile for long periods of time, using a combination of solutions including resettlement. The five identified protracted situations were: Afghan refugees in Pakistan and the Islamic Republic of Iran; Rohingya refugees (from Burma) in Bangladesh; Eritrean refugees in eastern Sudan; Croatian and Bosnian refugees in Serbia (Serbians who fled Croatia and Bosnia during the Yugoslav Wars); and Burundian refugees in the United Republic of Tanzania.⁴²³

The UNHCR has thus relied on burden-sharing and international solidarity in cases where the host was unable to naturalise refugees because it found it too burdensome.

8. CONCLUSION

This chapter has shown that despite the fact that international refugee law and human rights treaties recognise a wide range of human rights that refugees have, refugees are unable to enjoy them because of their status. States need to do more than guarantee on paper refugee rights. Many practical problems prevent refugees from accessing their rights. Their status as the 'other' and their lack of belonging to a political community puts them at a disadvantage and accounts for the continuing discriminatory treatment against them. Refugee status has to end at some point in order for refugees to enjoy their dignity and all their rights.

This chapter has shown that international law provides an adequate basis for saying that refugees are entitled to durable solutions that end their refugee status. Although voluntary repatriation is one such important solution, it is unavailable in some refugee situations for reasons such as the persistence of the reasons for flight and asylum in the home State. It has

⁴²³ Ibid.

been shown that the UN Refugee Convention, the OAU Convention, and the Stateless Convention allow for the assimilation and naturalisation of refugees. These avenues could be used to protect refugees in protracted situations. However, assimilation or local integration has been interpreted narrowly by the UNHCR and as such does not include permanent residence. This chapter has argued that such a narrow conception of local integration cannot be regarded as a durable solution to refugees in protracted situations.

Naturalisation, on the other hand, has the advantage of ending refugee status. While some States have entered reservations to the naturalisation provision, South Africa has not done so and is therefore bound to implement the obligations that flow from it. These include the obligation to facilitate naturalisation as far as possible and to reduce the costs and burden of naturalisation.

The principle of international solidarity can play a role in finding solutions for refugees in protracted situations where assimilation and naturalisation have been deemed to be too onerous for States. The UNHCR together with States have made available solutions, such as resettlement to a third country and have successfully initiated comprehensive plans of action for refugees in protracted situation. It is incumbent on a state that claims that it cannot offer naturalisation to refugees in protracted situations to explore, through diplomatic channels, avenues for international cooperation to share the burden of responsibility to refugees in protracted situations.

The next three chapters will critique South Africa's law, practice and policy on refugees in protracted situations in the light of its international obligations highlighted in this chapter and Constitution.

CHAPTER FOUR

The Evolution of South African Refugee Law and Policy

1. INTRODUCTION

Thus far this thesis has established that international refugee law acknowledges the temporariness of refugee status. Although not decisive, it also recognises that refugee status has to come to an end in the host State if return to the country of origin is not viable. The UNHCR sought to address this problem by adopting the 2009 Conclusion on Protracted Refugee Situations as discussed in a previous chapter.⁴²⁴

This chapter will trace the evolution of refugee law in South Africa by charting its progress from a narrow race-based origin to a new framework that places human rights at the centre. It will also provide a general overview of the legislative framework within which refugees in South Africa are given protection and care. In particular, it will address the question whether South African refugee law and policy contemplated the problem of a protracted refugee situation. It will also demonstrate that because of South Africa's robust constitutional framework, its refugee law adopted an urban policy as opposed to a camp-based one. The provisions of the Constitution, especially those on human dignity and equality, are analysed to establish a constitutional basis for durable solutions to refugees caught up in a protracted situation. This will be followed by an overview of the rights of refugees and jurisprudence thereon.

⁴²⁴ See chapter two above for a detailed analysis of this Conclusion.

2. THE EVOLUTION OF REFUGEE LAW IN SOUTH AFRICA

2.1. Introduction

The history of refugee law and policy in South Africa spans across colonial, Apartheid and post-Apartheid eras. It shows that South African refugee law and policy have evolved from a preoccupation with race as its organising framework under colonialism and the Apartheid regime, to a framework that places human rights at the centre under the new Constitution.⁴²⁵

2.2. Colonial and Apartheid Refugee Law and Policy

The first refugees to arrive in Southern Africa in 1687 were the protestant French Huguenots,⁴²⁶ who fled from religious persecution in France. They came to Southern Africa from Holland as part of a colonial programme when South Africa was under Dutch colonial rule.⁴²⁷ After the formation of South Africa as a nation State in the Twentieth Century, the country provided sanctuary to many refugees from other regions and countries such as Eastern Europe, Rhodesia and Mozambique. These refugees were of European descent and race was the basis of their acceptance into South Africa.⁴²⁸ Both the French Huguenots four

⁴²⁵ S Peberdy *Selecting Immigrants: National Identity and South Africa's policies 1910 – 2008* Wits University Press: Johannesburg, chapter three.

⁴²⁶ P Coertzen 'The History of the Huguenots in South Africa', available at ngtt.journals.ac.za/pub/article/download/5/4, accessed on the 25 March 2016. See also P Denis *Memory and Identity: The Huguenots in France and the Atlantic Diaspora* (2003) University of South Carolina Press: Columbia at 286-291.

⁴²⁷ Ibid.

⁴²⁸ Peberdy op cit note 425.

centuries ago and refugees of European descent during Apartheid were immediately absorbed into South Africa as nationals.⁴²⁹ Crush points out that, ‘as soon as it was established that the refugee was readily assimilable with the European inhabitants of the Union (South Africa), meaning that they were white, their presence was embraced’.⁴³⁰ There were no prolonged periods of living as refugees in South Africa for such refugees. In most cases, the grant of a durable stay was immediate and their status was equivalent to that of a citizen.⁴³¹

Even though the UN Refugee Convention and the OAU Refugee Convention were already in operation, they had no impact on South Africa’s refugee law during Apartheid. Refugee admission remained race-based and the broad discretion accorded by law meant that the entry and settlement of desirables, like Europeans or Africans of European descent such as Rhodesians and Mozambicans, were granted full citizenship immediately.⁴³²

By contrast, South Africa ‘refused to acknowledge the presence of black refugees from these same countries who were refouled, repatriated or ignored and forced to live as undesirables on the margins of society’.⁴³³ Black Africans were only allowed into South Africa as migrant labourers who could be sent back when no longer needed.⁴³⁴ It was only in 1991 that the Apartheid government enacted the Aliens Control Act,⁴³⁵ which empowered the

⁴²⁹ Ibid; J Crush ‘Immigration, Human rights and the Constitution’ in J Crush (ed) *Beyond Control: Immigration and Human rights in a Democratic South Africa* (1998) IDASA: Cape Town at 2.

⁴³⁰ Ibid.

⁴³¹ Crush op cit note 429.

⁴³² Ibid at 487.

⁴³³ C Murray ‘Mozambican Refugees: South Africa’s responsibility’ (1986) 2 *South African Journal of Human Rights* at 154.

⁴³⁴ J Crush ‘A Historical Overview of Cross-Border Movement in South Africa’ in D A McDonald (ed) *On Borders: Perspectives on International Migration in Southern Africa* (2000) Southern Africa Migration Project: Ontario at 12-20.

⁴³⁵ Act 96 of 1991.

Minister to issue temporary permits to ‘prohibited persons’.⁴³⁶ The Act was highly criticised for not being favourable enough to black refugees⁴³⁷ and it was only during the last days of Apartheid that a memorandum of understanding was signed with the UNHCR that the black refugees from Mozambique would be recognised as such, but only for the purpose of repatriation.⁴³⁸

2.3. Post-Apartheid Refugee Law and Policy

By 1994, South Africa decided to move away from the policy of exclusion to one of inclusion on the basis of its new constitutional values.⁴³⁹ South Africa not only ratified the international refugee law instruments, it also enacted refugee specific legislation. South Africa ratified the OAU Refugee Convention in 1995 and acceded to the UN Refugee Convention and its Protocol in 1996. It is thus only in a post-Apartheid South Africa that refugees were accepted on the basis of human rights and international refugee law.

⁴³⁶ Ibid. Section 41(1) states: ‘The Minister may issue to a prohibited person a temporary permit on the prescribed form to enter and reside in the Republic for the purpose, and subject to the other conditions mentioned therein’.

⁴³⁷ Peberdy op cit note 425; Crush op cit note 429.

⁴³⁸ J Handmaker J & D Ndessomin ‘Solução Durável? Implementing a Durable Solution for Angolan Refugees in South Africa’ in J Handmaker et al (eds) *Advancing Refugee Protection in South Africa* (2011) Berghahn Books: New York; T Polzer ‘Adapting To Changing Legal Frameworks: Mozambican Refugees in South Africa: An Historical Overview’ (2007) 19 *International Journal of Refugee Law* at 22-50; See also C Dolan ‘Repatriation from South Africa to Mozambique: Undermining Durable Solutions?’ in R Black & K Koser (eds) *The End of the Refugee Cycle? Refugee Repatriation and Reconstruction* (1999) Berghahn Books: New York/Oxford.

⁴³⁹ Handmaker & Ndessomin ibid.

These constitutional developments and ratifications significantly altered the basis of South African refugee law and policy. In 1997, the Green Paper on migration⁴⁴⁰ was produced, which conceptualised the draft refugee policy. According to Hathaway, South African refugee law is founded on four elements: temporary protection, protection of refugee rights, collective responsibility, and that it was solution-orientated.⁴⁴¹ The Green Paper categorically stated that while South Africa, as a sovereign nation, had the right to decide who enters its territory, it would exercise this right in a manner that reflected the country's commitment to human rights:

As a sovereign state, South Africa reserves the right to determine who will be allowed entry to the country and under what conditions. The design and implementation of immigration policy must, however, be faithful to the new Constitution and Bill of Rights. It must also be consistent with our commitment to upholding universal human rights, administrative justice and certain basic rights for all the people who are affected by the South African state⁴⁴²

The Green Paper led to the development of two White Papers, one for Refugee Law⁴⁴³ and one for Immigration Law.⁴⁴⁴ There was a general consensus that immigration and refugee issues should be dealt with separately.⁴⁴⁵

⁴⁴⁰ The Draft Green Paper on International Migration published in South African Government Gazette - GN 849 in GG 18033 of 30 May 1997.

⁴⁴¹ J Hathaway 'Towards the Reformulation of International Refugee Law' (1996) 15 *Refuge* 1.

⁴⁴² 1997 Green Paper op cit note 440 at Section 1.1.3.

⁴⁴³ Draft Refugee White Paper, Pretoria, Government Gazette No 18988, June 1998.

⁴⁴⁴ White Paper on International Migration, Pretoria, Government Gazette No 19920, April 1999.

⁴⁴⁵ J Klaaren et al 'Talking a New Talk: A Legislative History of the Refugees Act of 1998' in Handmaker et al op cit note 437 at 50-51.

The Immigration White Paper,⁴⁴⁶ which resulted in the Immigration Act 13 of 2002, accepted the spirit of the Green Paper. Recognising the potential contribution of migrants, South Africa simultaneously adopted an affirmative action policy whereby employers were compelled to search for suitably qualified South Africans first and to invest in their training and development.⁴⁴⁷ While this policy is not directed at refugees it was inevitable that refugees would be affected by it.⁴⁴⁸ Similarly, the control-orientated aspect of the Immigration Act has had an impact on refugees. For example, international refugee law and domestic refugee law allow for the non-penalisation of the illegal entry of refugees, but the Immigration Act criminalises illegal entry. Perhaps most important for refugees is that a permanent residence application straddles both the Refugees Act and the Immigration Act, as will be shown in chapter six.

The Refugee White Paper, in its introductory paragraph, sets out succinctly the intentions and obligations regarding South Africa's refugee policy and legislation. It states:

The government of South Africa is committed to the granting of asylum to refugees; to provide them protection and search for a solution in line with its obligations and responsibilities which it assumed under the international law, as well as by incorporating a number of basic principles and standards in the Constitution.⁴⁴⁹

With the exception of the need for 'collectivised protection', the principles proposed in the Green Paper were incorporated in the White Paper. On the whole, the White Paper, on which

⁴⁴⁶ Immigration White Paper op cit note 444.

⁴⁴⁷ V Williams 'In Need of Protection: Good Policy versus Harsh Reality for Refugees in South Africa' (2000) 9 (3) *Refugees, Conflict & Conflict Resolution*.

⁴⁴⁸ Williams op cit note 447.

⁴⁴⁹ Draft Refugee White Paper op cit note 443 at Part 4.

Refugees Act 130 of 1998 was based, represents a significant departure from the past Apartheid immigration laws.

2.3.1 A Brief Overview of the Refugees Act

South Africa enacted the Refugees Act⁴⁵⁰ in 1998. Whilst the implementation of the Refugees Act leaves much to be desired,⁴⁵¹ substantively it is compatible with international refugee and human rights law.

Among other things, the Refugees Act sets out structures and mechanisms for administering status determination. These structures include Refugee Reception Offices,⁴⁵² which are staffed by reception officers⁴⁵³ and status determinations officers,⁴⁵⁴ as well as two oversight bodies – the Refugee Appeal Board⁴⁵⁵ and the Standing Committee of Refugee Affairs⁴⁵⁶ – to review and to hear appeals against decisions taken by the status determination officers.

⁴⁵⁰ Act 130 of 1998.

⁴⁵¹ I Palmary 'Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government.', available at <http://www.csvr.org.za/wits/papers/papalm4.htm>, accessed 1 March 2016; See also C Kavuro 'Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market' (2015) 19 *Law, Democracy and Development* at 232 – 260.

⁴⁵² Refugees Act at section 8.

⁴⁵³ Ibid at section 8 (2).

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid at section 12 (1).

⁴⁵⁶ Ibid at section 9 (1).

The Refugees Act also offers a generous range of rights and entitlements to refugees. It defines the refugee in terms similar to the UN Refugee Convention as well as the OAU Refugee Convention.⁴⁵⁷ It expressly states that all rights in the Bill of Rights of the South African Constitution apply to refugees.⁴⁵⁸

⁴⁵⁷ Refugees Act at section 3 provides: Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if 20 that person -

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b).

⁴⁵⁸ Ibid. Section 27 states:

27. Protection and general rights of refugees

A refugee -

- (a) is entitled to a formal written recognition of refugee status in the prescribed form;
- (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;
- (c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;
- (d) is entitled to an identity document referred to in section 30;
- (e) is entitled to a South African travel document on application as contemplated in section 31;
- (f) is entitled to seek employment; and
- (g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

Like the UN Refugee Convention and the OAU Refugee Convention, the Act has provisions on cessation of refugee status⁴⁵⁹ and recognises the principle of non-refoulement.⁴⁶⁰ Significantly, the Act provides for possibilities for ending refugee status after a period of continuous stay.⁴⁶¹ These possibilities are the subject of critical discussion in chapters five and six of the thesis.

The major shift in refugee law and policy from Apartheid to democracy can be summarised as follows. South Africa has moved from the *ad hoc* approach during Apartheid, which allowed abuse by the executive and administrative officials⁴⁶² and excluded black refugees. The previous policy used the doctrine of sovereignty to regard citizenship as a prerogative of the State such that the State could choose without censure to whom it granted refugee status and citizenship. Now, this right has to be counterbalanced by the country's commitment to human rights.

2.3.2. Protracted Refugee Situation in Current Refugee Legislation

As is evident from the previous discussions on the temporary nature of refugeehood in chapter two, one way of establishing whether legislators and policy-makers were mindful of protracted refugee situations is to establish whether they considered the fact that refugeehood was a temporary phenomenon.

⁴⁵⁹ Ibid. Section 5 of the Act provides for the Cessation of refugee status

⁴⁶⁰ Refugees Act at section 2 provides for the general prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances.

⁴⁶¹ Refugees Act at section 27(c).

⁴⁶² Crush op cit note 429.

Initially, South Africa sought to highlight the action of refugee protection as a temporary one. The Green Paper on migration said: ‘The objective of the model is to provide *temporary protection* to persons whose basic human rights are at risk in their country of origin, until such time as they are able to return home in safety’.⁴⁶³ The UNHCR raised an objection to the use of the phrase ‘temporary protection’, arguing that refugee protection should be granted for ‘as long as it is needed’.⁴⁶⁴ According to the UNHCR, the term ‘temporary protection’ did not imply protection for the entire duration that it was needed, but rather for a short while only. The UNHCR justified its criticism of ‘temporary protection’, because the UNHCR only invokes cessation (that is the termination of refugee status) when protection is no longer necessary, not simply after a brief period of protection.

In defence of the South African Green Paper, Hathaway, who was one of the drafters of the Paper, responded that ‘temporary protection’ was consistent with the idea that refugee protection must be provided for as long as such protection is needed.⁴⁶⁵ It is clear from South African refugee policy that South Africa did not intend to withdraw protection ‘whilst needed’ and that the term ‘temporary protection’ was not intended to be protection for a brief period. However, the UNHCR’s criticism remains valid if one considers the question of protracted refugee situations. South Africa, in its formulation of temporary protection, did not explicitly state that it recognised the temporary nature of refugeehood, something the UNHCR professes too. South Africa missed the opportunity to directly address the issue of protracted refugee situations, and the consequences thereof by not stating it boldly, thus allowing for a misconception to occur. At the time the South African Green Paper was being

⁴⁶³ 1997 Green Paper at section 4.2.2.

⁴⁶⁴ J Hathaway ‘Temporary Protection of Refugees: Threat or Solution’ in J Handmaker (2001) *Perspective on Refugee Protection in South Africa* Lawyers for Human Rights: South Africa.

⁴⁶⁵ Hathaway op cit note 464.

drafted, there were already known protracted situations in the world. The threat of long-term refugees becoming *de facto* stateless refugees also existed. These issues were not addressed in the Green Paper. It can, therefore, be said that the drafters of the Green Paper on immigration did not link the concept of temporary protection to the problem of protracted refugee situations.

Nevertheless, the intended temporary nature of refugeehood is evident in South African refugee policy, because the temporary protection offered is strongly linked to the concept of durable solutions.⁴⁶⁶ The Green Paper also stated that absorption into the South African community should only be considered as an option if voluntary repatriation is not possible, but it did recognise that there will be some refugees who should be diverted from the usual system of protection and be admitted as permanent residents immediately. It identified unaccompanied minors and those traumatised by torture as examples of such refugees.⁴⁶⁷ Furthermore, the Green Paper also acknowledged the temporary nature of refugeehood by considering permanent residence after a five year period of continuous stay for those unable to return to the country of origin. A five year maximum duration was considered to be a fair balance between the need to ensure a temporary protection and the need for stability and security.⁴⁶⁸

⁴⁶⁶ 1997 Green Paper at section 4.6.1 'Because we believe that a continuing commitment to refugee protection will only be possible if it is solution-oriented, temporary protection must be delivered in a way that is dedicated to preparing refugees for a successful return, when and if conditions allow.'

⁴⁶⁷ C Eyber & J Hathaway 'Refugee Protection in South Africa: A Conversation', available at www.queensu.ca/samp/sampresources/migrationdocuments/interviews/inter1.htm accessed 5 December 2016.

⁴⁶⁸ 1997 Green paper at s 4.6.7 provides 'More generally, the duration of temporary protection must be constrained to what is reasonable to advance a programme of solution-oriented protection. An outside limit to temporary protection should be clearly established in recognition of the psychosocial need of refugees ultimately to have access to enduring stability and security. Particularly where temporary protection is delivered

For its part, the White Paper embraced the temporary nature of refugeehood⁴⁶⁹ although it does not use the term ‘temporary protection’. The White Paper provides that refugees may apply for naturalisation after a period of five years of being recognised as a refugee in South Africa.⁴⁷⁰ No further requirements are needed. The White Paper does not also expect refugees to apply for permanent residence first before naturalisation.

However, the White Paper makes no direct mention of voluntary repatriation as a durable solution. It only recognises cessation and naturalisation as an end to refugeehood. It therefore can be seen as a strong statement of acceptance that refugee status cannot continue into perpetuity, despite the fact that it does not expressly state that naturalisation is meant to prevent a protracted refugee situation.

The Refugees Act, which followed the White Paper, recognises a legal pathway to ending refugee status in South Africa, but is not as generous in extending naturalisation to refugees as the White Paper. The Act is nevertheless considered progressive, not least because of its adoption of the UN Refugee Convention’s Article 34. The Act has embraced the concepts of ‘assimilation and naturalisation’ as found in the UN Refugee Convention by providing a clear legal pathway to ending refugee status. Thus, where return was not possible

in the rights-regarding and solution-oriented manner proposed here, the evidence of repatriation practice to-date in other countries suggests that a *five-year maximum* duration would strike a fair balance between the need to ensure the ability to temporary protection to allow for the regeneration of a substantial part of asylum capacity, without exposing refugees to psychosocial risk. Refugees should benefit from a firm guarantee to make permanent residence available at the end of the temporary protection period.’

⁴⁶⁹ Draft White Paper op cit note 443.

⁴⁷⁰ Ibid at section 4.8.3.

after five years of continuous stay as a recognised refugee, the refugee can apply for permanent residence.⁴⁷¹

Unlike the White Paper, the Refugees Act adopted the bifurcated approach whereby permanent residence precedes naturalisation. This has complicated access to naturalisation because a further requirement was introduced by the Refugees Act which states that refugees must prove that they will remain refugees ‘indefinitely’. This requirement must be met before refugees can apply for permanent residence. This cumbersome administrative process will be discussed in chapter six.

The inclusion of permanent residence is linked to the durable solution of repatriation. Only those refugees who are unable to prove that they are unable to return to the country will be eligible to apply for permanent residence. The notion of temporary protection is also linked to immigration status and it was envisaged in such a way that such temporary protection should not be a ‘back door to permanent immigration’.⁴⁷² This policy standpoint suggests transforming refugee status into durable immigration status might not be as straightforward as the law seems to suggest on the face of it.

2.3.3. The Issue of a Protracted Refugee Situation in the 2016 Green Paper

A new Green Paper was published in 2016 which speaks directly to the issue of a protracted refugee situation.⁴⁷³ The Paper reiterates that South Africa has a sovereign right to manage its

⁴⁷¹ Chapter five will provide a detailed analysis of both the pathway and processes involved in permanent residence.

⁴⁷² 1997 Green paper on migration at s 5.3.2.

⁴⁷³ Green Paper on the International Migration Government Notice 738 *Government Gazette* 40088 of 24 June 2016.

international migration in its national interests and notes that the national interest is to be defined in line with the country's constitutional values, human rights, national security and peace, stability and developmental aspirations.⁴⁷⁴ It is therefore not surprising that the Paper once again affirms the urban policy its refugees. It justifies this policy thus: 'The current policy of non-encampment should continue as permanent camps in our context would create serious logistical, security and humanitarian problems. It is far better to integrate those given refugee status'.⁴⁷⁵ South Africa thus remains committed to an urban refugee policy.⁴⁷⁶

According to the 2016 Green Paper, South Africa's inability to cater for indigent asylum seekers is a gap in its policy for refugees. Nevertheless, the Paper maintains that the urban policy where refugees take care of themselves is the better option for South Africa. Consequently, while the 2016 Green Paper does not advocate for the withdrawal of socio-economic rights for refugees, it makes a strong statement that temporary asylum seekers should be denied the right to work and that their movement should be restricted until their refugee claims have been processed.

It is, however, with regard to the permanent integration of refugees that the 2016 Green Paper will have more devastating consequences for long-staying refugees, if is enacted into law. One of its major aims is to block the refugees' pathway to permanent residence. The 2016 Green Paper views the current approach to the granting of residency or naturalisation as being 'mechanical and compliance-based', rather than being tailored to achieving strategic goals such as nation building. It states that: 'it is a misconception that immigrants have a

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid at page 67.

⁴⁷⁶ Ibid at page 67.

constitutional right to progress toward residency or citizenship status. A sovereign state has the prerogative to determine who enters its territory and to enact laws accordingly'.⁴⁷⁷

Not only is the 2016 Green Paper completely silent on protracted refugee situations, it also categorically states that it does not see why South Africa has to convert refugee status into permanent residence. It links durable solutions to the temporary protection of refugees and only whilst conditions in the country of origin do not allow return. It states:

Refugees are allowed to apply for permanent residence even though their status is inherently temporary. This is because refugees are expected to return to their country of origin once conditions there allow them to return safely. This should not be regarded as automatic but linked to finding durable solutions in the event of conditions changing, such as developments in the country of origin of the refugee.⁴⁷⁸

It proposes as an intervention that 'refugees should *not* be allowed to apply for permanent residence on the grounds of the number of years spent in the country'.⁴⁷⁹ This will clearly be disastrous for refugees who cannot return to their country of origin. Once again, the criticism remains: South Africa has not considered the problem of refugees in a protracted refugee situation in. In fact, this new approach will compound this problem.

As South Africa has not filed any reservations to the UN Refugee Convention, it is bound to respect Article 34 of this treaty and thus not to block the pathway to naturalization. Failure to do so means that South Africa is violating its obligations in international law.

3. SOUTH AFRICA'S ADOPTION OF AN URBAN REFUGEE POLICY

⁴⁷⁷ 2016 Green Paper op cit note 473 at page 39.

⁴⁷⁸ Ibid at page 40.

⁴⁷⁹ 2016 Green Paper op cit note 473 at page 41.

The previous chapter has shown that the UN Refugee Convention recognises a wide range of rights that ought to be sufficient for the safety and protection of refugees and for them to live a meaningful life in the host State. Similarly, South Africa's laws, as has been shown above, recognise a wide range of rights for refugees. The UNHCR has nevertheless introduced the concept of an urban policy for refugees⁴⁸⁰ when it realised that the rights on paper were not sufficient for the meaningful integration of refugees in urban areas.⁴⁸¹ The Urban Policy became necessary since neither the restriction on freedom of movement nor the lack of resources failed to stem the urbanisation of refugees.⁴⁸² The objective of the UNHCR's Urban Policy is two-fold: to promote the self-reliance of refugees, and avoid their dependency on the UNHCR for assistance.⁴⁸³ The Policy affirms that 'the overriding priority remains to ensure protection and, in particular, non-refoulement and treatment in accordance with recognised basic human standards'.⁴⁸⁴

The Urban Policy, as envisaged by the UNHCR, allows for the enjoyment of a range of rights. It is viewed as a counterweight to the confinement of refugees in camps. It considers

⁴⁸⁰ UNHCR 'UNHCR Policy on Refugee Protection and Solutions in Urban Areas' (2009), available at <http://www.refworld.org/docid/4ab8e7f72.html>, accessed 25 July 2016.

⁴⁸¹ L Landau 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' (2006) 19 *Journal of Refugee Studies* at 308–327; See also J Crisp J Janz J Riera & S Samy *Surviving in the City: A Review of UNHCR's Operation for Iraqi Refugees in Urban Areas of Jordan, Lebanon and Syria* Geneva: UNHCR (2009); S Bailey *Is Legal Status Enough? Legal status and Livelihood Obstacles for Urban Refugees*. The Fletcher School MALD Thesis (2004).

⁴⁸² J Crisp T Morris & H Refstie 'Displacement in Urban Areas: New Challenges, New Partnerships' (2012) 36(1) *Disasters* (2012) S23-S42; G Kibreab 'Why Governments Prefer Spatially Segregated Settlement Sites for Urban Refugees' (2007) 24(1) *Refuge: Canada's Journal on Refugees* 27

⁴⁸³ UNHCR Urban Policy op cit note 480 at para 21.

⁴⁸⁴ Ibid at para 14.

urban areas and cities in particular to be legitimate places for refugees to enjoy their rights, including those stemming from their status as refugees as well as those that they hold in common with other human beings.⁴⁸⁵ The Urban Policy therefore sets out to ‘expand the protection space’ for refugees.⁴⁸⁶ Its aim is to facilitate the enjoyment of the rights by refugees and their integration in their local communities.⁴⁸⁷

It is evident that the refugee camp situation cannot be justified and various scholars have confirmed this. Agamben, for example, has identified the camp as the pure space of exception. For him, the camp represents a place where the exception becomes the rule. The ‘bare life’ of the individual in the camp is revealed as ‘subjected to the raw power of the State to ignore, deny and exclude’.⁴⁸⁸ Refugee camps in which refugees are housed have been likened to ‘concentration camps’.⁴⁸⁹ They breach human rights laws and treaties on multiple fronts.⁴⁹⁰

The UNHCR, by means of its Urban Policy, encourages host governments to accede to and respect the international refugee law and human rights instruments and to adopt and implement appropriate domestic legislation.⁴⁹¹ The Policy also strives to ensure that refugees have access to justice systems, are treated as equals before the law, and are not subjected to

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid at paras 14-22.

⁴⁸⁷ O Naoko & J Crisp ‘Evaluation of the Implementation of UNHCR’s Policy on Refugees in Urban Areas.’ EPAU Evaluation Reports (2001), available at http://scholar.google.com/scholar?q=UNHCR+urban+policy+for+refugees+jeff+crisp&btnG=&hl=en&as_sdt=0%2C5, accessed 20 February 2017.

⁴⁸⁸ G Agamben *Homo Sacer: Sovereign Power and Bare Life* (translated by Daniel Heller Roazen) (1998) Stanford University Press: California at 134.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ UNHCR Urban Policy op cit note 480 at para 25.

any form of discrimination by law enforcement agencies and other representatives of the State.⁴⁹² Most importantly, the Urban Policy recommends that host governments play a major role in the integration of refugees; they are expected to provide reception facilities and undertake registration of refugees and ensure that they are documented.⁴⁹³ Not only must the host government determine the status of refugees, it must also reach out to the refugee community and foster constructive relations between refugees and citizens;⁴⁹⁴ ensure the security of refugees and promote livelihoods and self-reliance;⁴⁹⁵ ensure access to healthcare, education and other services; and allow for the freedom of movement of refugees.⁴⁹⁶ The main strong points of the Urban Policy is its focus on urging host governments to foster constructive relations between refugees and citizens, and on ensuring respect for the rights of refugees guaranteed by the UN Refugee Convention.

South Africa has ratified the international refugee law and human rights instruments and has adopted and implemented appropriate domestic refugee legislation. In addition, its constitutional rights also apply to all those physically present in the country, including refugees.⁴⁹⁷ The constitutional framework of South Africa as well as its adoption of human rights laws cannot therefore validate the ‘bare life’ as identified by Agamben in the refugee camps.

South Africa has already distinguished itself as one of few African countries to allow refugees to self-settle in urban areas.⁴⁹⁸ The Urban Policy is, therefore, inherent in South

⁴⁹² Ibid at para 26.

⁴⁹³ UNHCR Urban Policy op cit note 480 at para 27.

⁴⁹⁴ Ibid at para 40.

⁴⁹⁵ Ibid at para 101.

⁴⁹⁶ Ibid at para 110.

⁴⁹⁷ Ibid.

⁴⁹⁸ Landau op cit note 481 at 308.

African law and the government plays a significant role in protecting refugees and finding durable solutions for them, as opposed to the practice in countries which have refugee camps where the UNHCR is largely in control of the running of the camps and is responsible for finding durable solutions.

South African refugee legislation makes provision for all the necessary elements for the successful local integration of refugees. Refugees are entitled to documentation that allows them to legally sojourn in South Africa and the government is empowered to determine who is and who is not a refugee in South Africa.⁴⁹⁹ The legislation also guarantees various socio-economic rights which ought to allow refugees to integrate into South African society.⁵⁰⁰ While it recognises the rights of the individual refugees, it does not provide for group determinations, except in cases of emergency. The policy adopted by South Africa is therefore in line with its constitutional commitments to human rights and dignity, and with the UNHCR's Urban Policy. As stated above, South Africa has enacted a refugee policy intended to 'maximize freedom and protection by promoting refugees' temporary integration into local communities'.⁵⁰¹

However, the presence of refugees in urban areas raises significant protection concerns that ought to be remedied with the progressive realisation of their rights in South Africa. In a study done exploring the experiences of a selected group of refugees and asylum seekers in Johannesburg, Landau argues that South Africa 'lacks institutional prerequisites for translating refugees' legal rights into true entitlements and that the shortcoming is exacerbated by the economic migrants using the asylum system'. He states that:

⁴⁹⁹ W Kerfoot & T Schreier 'Application for Asylum: Reception' in F Khan & Tal Schreier (eds) *Refugee Law in South Africa* (2014) Juta & Co Ltd: Cape Town.

⁵⁰⁰ K Jacobsen 'Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective' (2006) 19 (3) *Journal of Refugee Studies* at 273-286.

⁵⁰¹ Landau op cit note 481.

Despite its intention to protect the welfare and dignity of those seeking refuge in South Africa, South African refugee policy reflects almost no State obligations for providing specialized assistance, even for unaccompanied children and the disabled. Rather, its explicit obligations are limited to bureaucratic processes intended to facilitate access and integration. Moreover, while the Constitution guarantees that ‘South Africa belongs to all who live in it’, the Refugees Act makes no specific provision for a durable solution within South Africa and the Government has consistently resisted efforts to allow naturalization for refugees who have remained in the country for extended periods.⁵⁰²

According to Landau, it has become obvious that South Africa is struggling to fairly implement its progressive refugee laws as laid out in the Refugees Act.

As far back as the drafting of the 1997 Green Paper, Hathaway cautioned South Africa that the traditional means of implementing refugee law serves ‘fewer and fewer people, less and less well’. He identified two problems: the first being individuated State responsibility and the second being a lack of durable solutions.⁵⁰³ It is evident that fewer and fewer refugees are being assisted and that the assistance provided to the few is diminishing as well. In addition to Hathaway’s grim forecast, various other factors have come to light, such as bad faith operations on the part of government, the many fraudulent asylum applications and poor implementation of the asylum system.⁵⁰⁴ Others have cited the following reasons for this:

⁵⁰² L Landau ‘Regional Integration, Protection and Migration Policy Challenges in Southern Africa’ in J Handmaker et al (eds) *Advancing Refugee Protection in South Africa* (2007) Berghahn Books: New York 27 – 46.

⁵⁰³ Hathaway op cit note 464.

⁵⁰⁴ R Amit ‘All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination’ (2012) African Centre for Migration and Society.

administrative bungling,⁵⁰⁵ lack of political will to assist refugees,⁵⁰⁶ corrupt government officials,⁵⁰⁷ xenophobia⁵⁰⁸ and even disregard for the rule of law.⁵⁰⁹ In *Kiliko*, the court had to issue a structural interdict to force government to meet its responsibility.⁵¹⁰ It is evident that 20 years of the Refugee Act, which has been hailed as a very progressive legislation, refugees still struggle to integrate.

Landau has rightly argued that South Africa's urban policy requires more than the mechanical application and extension of rights to urban refugees. The South African government must play a greater role in the integration of refugees. Because the Bill of Rights has a direct bearing on all persons present in South Africa, it is expected that the values of the constitution, such as Ubuntu, will assist the refugee integrate in a meaningful way into South African society. This chapter will therefore continue by discussing South Africa's constitutional obligations to refugees and the jurisprudence of South Africa's Courts thereon, the aim being to find out whether such jurisprudence can benefit refugees in protracted situation in South Africa.

⁵⁰⁵ Ibid.

⁵⁰⁶ L B Landau 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' (2006) 19 (3) *Journal of Refugee Studies* at 3.

⁵⁰⁷ R Amit 'Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System' (2015) A Report by Lawyers for Human Rights.

⁵⁰⁸ Staff Reporter 'Government in Denial about Xenophobic Violence' *SA Breaking News* 19 June 2014, available at <http://www.sabreakingnews.co.za/2014/06/19/xenophobic-violence-dismissed-by-government-to-keep-its-image/>, accessed on 14 July 2016.

⁵⁰⁹ Amit op cit note 504.

⁵¹⁰ *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C).

4. SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK

4.1. The Bill of Rights and Non-Citizens

As noted earlier, South Africa adopted its final Constitution in 1996. At its core, the Constitution seeks to remedy South Africa's isolation and previous disregard of human rights by bringing its laws into harmony with international human rights standards. Section 9 of the Constitution thus obligates the courts, when interpreting the Bill of Rights, to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom',⁵¹¹ and to consider international law. Furthermore, section 233 of the Constitution requires courts, when interpreting legislation, to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.⁵¹²

The South African Bill of Rights has been lauded for recognising a wide range of rights encompassing both civil and political rights and economic, social and cultural rights. For example, it guarantees the right to freedom and security of person,⁵¹³ the right not to be subjected to slavery or forced labour,⁵¹⁴ the right to freedom of conscience and religion,⁵¹⁵

⁵¹¹ Constitution of the Republic of South Africa, 1996 at section 9.

⁵¹² Ibid at section 233.

⁵¹³ Ibid at section 12.

⁵¹⁴ Ibid at section 13.

⁵¹⁵ Ibid at section 15.

freedom of movement,⁵¹⁶ and the right to fair labour practices.⁵¹⁷ Among the socio-economic rights, the Bill of Rights enshrines the right to have access to adequate housing, and the right to have access to health care, food, water and social security, including appropriate social assistance.⁵¹⁸ With regard to these socio-economic rights, the government has a duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each right.⁵¹⁹ The right to emergency medical treatment, unlike these socio-economic rights, is not framed with the qualifications related to availability of resources, progressive realisation and reasonable measures.⁵²⁰

In addition to the rights of adults, the Constitution recognises specific rights for children. These include the right of ‘every child’ to a name and nationality, to family care or appropriate alternative care, to ‘basic nutrition, shelter, basic health care services and social services’, to be ‘protected from maltreatment, neglect or abuse’, ‘not to be detained except as a measure of last resort’, and to be ‘protected in times of armed conflict’.⁵²¹

It is noteworthy that the Bill of Rights uses the term ‘everyone’ when defining general constitutional rights and ‘every child’ when defining the special or specific rights of children. Both these terms can be interpreted to refer to refugees, adults, and children respectively. The rights that do not extend to refugees or non-citizens are specifically identified by the Bill of Rights. For example, section 20 provides that ‘[n]o citizen may be deprived of citizenship’.⁵²² Section 22⁵²³ provides that every citizen has a right to choose a trade,

⁵¹⁶ Ibid at section 21.

⁵¹⁷ Ibid at section 23.

⁵¹⁸ Constitution op cit note 511 at section 27.

⁵¹⁹ Ibid at sections 26(2) and 27(2).

⁵²⁰ Ibid at section 29.

⁵²¹ Ibid at section 28.

⁵²² Ibid at section 10.

occupation and profession. Apart from these few exceptions, the rest of the rights in the Bill of Rights apply to non-citizens, including refugees. The extensive protection given to human rights means that the South African Constitution has a framework for a rights-based approach to refugee protection. In the next section, this chapter lays emphasis on the rights to human dignity and equality as fundamental building blocks of an effective refugee protection regime, especially in a protracted situation.

4.2. The Rights to Equality, Non-Discrimination and Human Dignity

With the advent of the constitutional era in South Africa and the fact that the foundation of South African refugee law is respect for the universality of human rights, there has been a realistic expectation that refugees will live with dignity in South Africa. As demonstrated above, the acceptance of the Urban Policy, as opposed to the warehousing of refugees in refugee camps and detention centres clearly developed out of respect for human rights. However, respect for human rights does not necessarily mean that the right to dignity extends equally to everyone or that discrimination is not practised. As argued in the previous chapter, refugees cannot fully live in dignity unless the ‘notion of citizenship’⁵²⁴ is extended to them.

The right to non-discrimination is crucial to refugees. Hathaway claims that ‘a guarantee of non-discrimination might in fact be virtually the only legal guarantee that many refugees require because ‘any unequal treatment must be properly justified according to consistently applied and acceptable criteria’.⁵²⁵ The right to equality and human dignity are well

⁵²³ Ibid at section 22.

⁵²⁴ J Waldron ‘Dignity, Rank, and Rights’ (2009) *The Tanner Lectures on Human Values* at 209–253.

⁵²⁵ The UN Human Rights Committee (General Comment No 18: Non-discrimination at para 13) expressed a general principle of human rights law according to which differentiation of treatment is only allowed if ‘the

entrenched in international law.⁵²⁶ As a result, the protection of human rights does not depend on one's affinity to a State via nationality or citizenship. As the Human Rights Committee has said, '[t]he enjoyment of the Covenant Rights is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to jurisdiction of the State Party'.⁵²⁷

In South Africa, the right to equality and the right to human dignity are recognised as independent rights and as fundamental constitutional values. For example, section 1(a) and (b) of the Constitution provides that the Republic of South Africa is founded on 'human

criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'. This approach has essentially also been taken by the European Court on Human Rights, affirming that in the exercise of a right laid down in the Convention the 'principle of equality of treatment is violated if the distinction has no objective and reasonable justification'. See *Belgian Linguistic Case*, judgement of 23 July 1968, Series A, No 6 at para 10. In *Abdulaziz, Cabales and Balkandali v the United Kingdom* realised' (judgement of 28 May 1985, Series A No 94 para 72), the Court held that 'a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be.

⁵²⁶ See eg International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (CERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006 (entered into force 3 May 2008).

⁵²⁷ General Comment No 31 UN Doc CCPR/C/21/Rev.1/Add13[10], referring to General Comment No 15, UN Doc HRI/GEN/1 Rev.

dignity’, ‘the achievement of equality’, ‘non-racialism’ and ‘non-sexism’.⁵²⁸ Furthermore, section 7(1) recognises equality as a democratic value. The right to equality is protected in section 9 as having several elements: the right to equality before the law, the right to equal protection and benefit of the law, the right to full and equal enjoyment of all rights and freedoms, and the right not to be discriminated against unfairly. Section 10 provides that ‘[e]veryone has inherent dignity and the right to have their dignity respected and protected’.

In South Africa, human dignity is intimately connected with the idea of rights – whether with the ground of rights, the content of certain rights or the form and structure of rights.⁵²⁹ This thesis endorses the concept that dignity is not only a moral concept: it is, moreover, a juridical concept.⁵³⁰ In the same way that the preamble to the ICCPR asserts that the rights contained in the Covenant ‘derive from the inherent dignity of the human person’,⁵³¹ the South African Bill of Rights does too.⁵³² However, that does not necessarily mean that it must be treated as a moral idea only because a deeper understanding of the human being is expected.⁵³³

Even though South African Constitutional law operates from the premise that dignity is ‘inherent in every human being’ and that we should strive to uphold everyone’s dignity, the right to dignity is yet to be fully defined.⁵³⁴ Some scholars claim that ‘its intrinsic meaning

⁵²⁸ Constitution op cit note 511.

⁵²⁹ Waldron op cit note 524.

⁵³⁰ De Waal & Currie op cit note 65 at 251.

⁵³¹ International Covenant on Civil and Political Rights (1966) at the preamble.

⁵³² Constitution op cit note 511 at preamble.

⁵³³ De Waal & Currie op cit note 65 at 135 on the method of interpretation of the Bill of Rights.

⁵³⁴ A Chaskalson ‘The Third Bram Fischer Lecture-Human Dignity as a Foundational Value of Our Constitutional Order’ (2000) 16 *South African Journal on Human Rights* at 193.

has been left to intuitive understanding'.⁵³⁵ Christopher McCrudden, one of the leading proponents of this school of thought, dismisses the use of dignity in human rights jurisprudence, arguing that the concept houses too many intractable political debates.⁵³⁶ After a wide investigation into the concept's juridical use, McCrudden concludes that 'there are no coherent national interpretations of the concept of human dignity, let alone a transnational one'.⁵³⁷

In contrast to this approach, other scholars have argued that dignity considerations reflect the Kantian moral imperatives. Proponents of this approach often turn to Kant's *Groundwork to the Metaphysics of Morals*,⁵³⁸ where Kant argues that human beings should be treated as ends not means.⁵³⁹

⁵³⁵ O Schachter 'Human dignity as a Normative Concept' (1983) *American Journal Of International Law* at 849. 'We do not find an explicit definition of the expression of dignity of the human person in international instruments or in national laws. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors'. See also S Pinker 'The Stupidity of Dignity' Richard Dawkins Institute for Reason and Science (Sunday 1 May 2008). Additionally, the Supreme Court of Canada citing the work of J Fyfe 'Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada' (2007) 70 *Saskatchewan Law Review* signaled that it would consider abandoning the concept of human dignity altogether. More specifically, at para 22 of *R v Kapp* [2008] 2 SCR 483, 2008 SCC 41 the Supreme Court of Canada states: 'human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.'

⁵³⁶ C McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655 at 656.

⁵³⁷ Ibid.

⁵³⁸ Kant op cit note 261 at 84–85.

⁵³⁹ De Waal & Currie op cit note 65 at 251.

Over the past few years, a third approach seeking to re-establish the connection between dignity and rank in legal theory has emerged. Jeremy Waldron, the leading proponent of this view, suggests that the judicial concept of human dignity affords an equal and high-ranking status to all human beings.⁵⁴⁰ Waldron maintains that the universality of the human rights approach currently in place means we have ‘adopted the idea of a single status system, evolving a more or less universal status, a more or less universal legal dignity that entitles everyone to something like the treatment before the law that was previously confined to high-status individuals’.⁵⁴¹ Furthermore, according to Waldron, Kant’s use of dignity is complicated, Kant does use the term in ways that line up more closely to the traditional connotations of nobility, such as that ‘no human being can be without a dignity because he at least has the dignity of a citizen’.⁵⁴² Waldron states that this statement of Kant associates dignity with rank. This ranking, he states, is however analogous to the well-known modern day conception of equal rights which has no rank or caste or class on the face of it.⁵⁴³ This idea of human dignity, of according this high ranking status to everyone,⁵⁴⁴ is what Waldron endorses.

4.3. The South African Courts Interpretation of the Right to Dignity and Equality

⁵⁴⁰ Waldron op cit note 524 at 233.

⁵⁴¹ Waldron op cit note 524 at 241.

⁵⁴² Kant op cit note 261 at 84–85.

⁵⁴³ Waldron op cit note 524.

⁵⁴⁴ Ibid at 200.

The South African Constitution is generally considered to be based on the Kantian approach and suggests that dignity is the ground of rights.⁵⁴⁵ In *S v Dodo*, Ackerman J of the South African Constitutional Court traced the origins of the concept of dignity to Kantian moral philosophy, where human dignity is considered to be what gives a person his or her intrinsic worth, and said: ‘Human beings are not commodities to which a price can be attached; they are creatures with inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.’⁵⁴⁶ In *Makwanyane*, O’Regan J said that ‘recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings’, and that ‘all human beings are entitled to be treated as worthy of respect and concern’.⁵⁴⁷ Chaskalson has made similar remarks.⁵⁴⁸

Whilst recognising the right to dignity as a foundational value, the South African Constitutional Court has not ventured a definition of dignity.⁵⁴⁹ In *Le Roux v Dey*,⁵⁵⁰ it said that human dignity has a wide meaning which covers a number of different values. The Constitutional Court has on several occasions linked the right to dignity and the equality and held that human dignity can serve as the overall goal of all rights. Although the Constitution seemingly places human dignity on par with equality, human dignity is more foundational than the right to equality and non-discrimination. Thus, the Constitutional Court has held that

⁵⁴⁵ De Waal & Currie op cit note 65.

⁵⁴⁶ Ackerman J in *S v Dodo* – 2001 (3) SA 382 (CC) at para 38 stated that ‘Human beings are not commodities to which a price can be attached; they are creatures with inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.’

⁵⁴⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 144.

⁵⁴⁸ Chaskalson op cit note 534 at 196.

⁵⁴⁹ De Waal & Currie op cit note 65 at 251.

⁵⁵⁰ 2011 (3) SA 274 (CC) at para 138.

unfair discrimination constitutes an assault on the dignity of the person.⁵⁵¹ In *President of the Republic of South Africa v Hugo*,⁵⁵² the Constitutional Court said that ‘the purpose of South Africa’s new Constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups’ and that this ‘dignitarian concept lay at the heart of the prohibition of unfair discrimination’.⁵⁵³ The Constitutional Court also stated in *Minister of Finance v Van Heerden*⁵⁵⁴ that equality in the Constitution does not tolerate distinctions that treat other people as ‘second-class citizens’, thereby emphasising the point that dignity and equality are interdependent.⁵⁵⁵ In *Mohamed v the President of SA*,⁵⁵⁶ the Constitutional Court referred to the universal applicability of the Bill of Rights as the basis for every person’s dignity.

If the right to dignity as a foundational right in South Africa acknowledges or starts from the premise that ‘all human beings have equal intrinsic worth’⁵⁵⁷ then it ought to have no problem recognising the common humanity of refugees and asylum seekers in South Africa. Even though refugee law in South Africa is rights-based and refugees ought to be able to enjoy these rights, refugees are finding it difficult to access these supposedly universally applicable rights.

⁵⁵¹ Ibid.

⁵⁵² 1997 (6) BCLR 708.

⁵⁵³ *Hugo* supra note 552 at para 41.

⁵⁵⁴ 2004 (11) BCLR 1125 (CC).

⁵⁵⁵ Ibid. The link between anti-discrimination and dignity is also apparent from Canadian jurisprudence where the court held that the purpose of the anti-discrimination provisions of the Charter was to prevent the violation of the essential human dignity. The Canadian Court held that ‘dignity infuses all elements of the of the discrimination analysis’; See *Law v Canada (Minister of Employment and Immigration)* 1999 (1) SCR 497.

⁵⁵⁶ *Mohamed and Another v President of the Republic of South Africa and Others* 2001(3) SA 893 (CC).

⁵⁵⁷ Kant op cit note 261.

5. THE RIGHTS TO DIGNITY AND EQUALITY FOR REFUGEES AND SOUTH AFRICAN COURTS' INTERPRETATION

The previous chapter has revealed how citizenship works as an *us v them* concept, and that membership to a political community is crucial to the enjoyment of human rights.⁵⁵⁸ However, bearing in mind the acceptance of the concept of universality of human rights in the South African Constitution and in international human rights instruments, this section will analyse the manner in which the South African Courts have applied the rights to dignity and equality to refugees and other migrants (non-citizens).

5.1. By Limiting the Sovereignty of the State

*Watchenuka*⁵⁵⁹ is considered seminal with regard to the interpretation of the right to dignity of non-citizens. In this case, the Supreme Court of Appeal boldly stated that 'human dignity has no nationality' and that the right to dignity can be used to prevent the 'humiliation and degradation' of any person even if it limits the sovereignty of the State.⁵⁶⁰

Mrs Watchenuka and her disabled son fled Zimbabwe and sought asylum in South Africa. She soon found herself destitute when faced with no social assistance from the government because of her temporary asylum seeker status and inability to access employment because of a general prohibition on the right to work and study for asylum seekers.

Faced with the decision whether to grant asylum seekers the right to work and study, the Supreme Court of Appeal recognised the power of the State to differentiate between citizens

⁵⁵⁸ See chapter three.

⁵⁵⁹ *Watchenuka* supra note 67.

⁵⁶⁰ Ibid at para 25.

and non-citizens and to decide whom to admit on its territory and on what terms. The Court quoted from an old American judgment⁵⁶¹ in which it was stated:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential in self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.⁵⁶²

This international maxim cited with approval by the Supreme Court of Appeal has since been qualified considerably by the Universal Declaration of Human Rights (UDHR),⁵⁶³ the UN Refugee Convention, the OAU Convention, and the South African Constitution itself, all of which impose an obligation on the government to provide protection to refugees.⁵⁶⁴ The State's sovereign authority to determine the entry and exit of refugees presented itself at the drafting of the UDHR. By recognising the 'right to seek and enjoy in other countries asylum from persecution',⁵⁶⁵ States were obligated to allow entry to refugees even as they retained

⁵⁶¹ *Nishimura Ekiu v United States* 142 US 651 (12 SCt 336, 35 LEd 1146), 18 January 1892.

⁵⁶² The same dictum was referred to approvingly by the Constitutional Court in *Chairperson of the National assembly, Ex Parte: In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC) paras 21-31 within the context of the challenge to section 22 of the amended constitutional text, which restricts the right to freedom of trade, occupation or profession to citizens. See Also the *Union of Refugee women v Director: Private Security Industry Regulatory Authority* 2007 SA 395 (CC) at para 46.

⁵⁶³ GA Res 217A (III), UN Doc A/810 at 71 (1948)..

⁵⁶⁴ See part 4 of this chapter for a discussion of the Bill of Rights; see also chapter three of this thesis for a detailed discussion of the international law instruments protecting these rights.

⁵⁶⁵ Article 14 of the UDHR states:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

their right to control their borders and regulate immigration. This right of States to control their borders was also encroached upon by the international obligation to refrain from the forcible return of asylum seekers to a country of persecution and the right to ensure that refugees ‘enjoy’ asylum.

In *Watchenuka*, the Court stated that the context within which State sovereignty was phrased can be distinguished from situations where the dignity of a person is impacted upon. The Court thus recognised the foundational nature of the right to dignity and used it to limit the right to sovereignty. It demonstrated that the right to dignity, which is boldly declared in international treaties and the South African Constitution, can be relied upon to challenge notions of sovereignty to protect non-nationals, in this case, asylum seekers, from ‘humiliation and degradation’.⁵⁶⁶ The Court found that a person who exercises his or her right to apply for asylum in South Africa and is destitute ‘will have no alternative but to turn to crime, or to begging or foraging’. In such cases, the Court held, ‘the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely inhibit the realisation of the potential for self-fulfillment’.⁵⁶⁷

Furthermore, the Supreme Court of appeal in *Watchenuka* raised the issue that the applicants in this case were asylum seekers and, therefore, easily identified as immigrants on the ‘lowest rungs of the immigration ladder’⁵⁶⁸ and that even they should be afforded the right to dignity. It therefore declared that ‘... human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And whilst

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

⁵⁶⁶ *Watchenuka* supra note 67 at para 32.

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid.

that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the bill of rights’.⁵⁶⁹

The Court did not base its decision on the immigration status of the person: instead, it viewed the impact of the denial of the right on the person’s human dignity. In spite of its bold statements, the Court did not uphold the general right to work of asylum seekers but left it to the adjudicating body, the Standing Committee of Refugee Affairs, to decide on a case by case basis whether to grant the right to work and to do so in cases where a denial of this right would lead to the ‘humiliation and degradation’ of the asylum seeker.

The Court, consequently, appealed to the common humanity which inheres in everybody, irrespective of nationality or citizenship. Overall, this judgment affirms the right of a non-citizen to be free from humiliation and degradation and effectively severs human dignity from nationality while carefully traversing the tensions between the universality of human rights and state sovereignty.⁵⁷⁰

5.2. By Drawing Similarities with Citizens

In *Khosa*,⁵⁷¹ the Constitutional Court drew similarities between citizens and non-citizens (in this case permanent residents). The applicants were Mozambican citizens who had lived in South Africa since 1980, and had acquired permanent resident status. They were destitute and would have qualified for social assistance grants if they were citizens. The applicants applied for social assistance in terms of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997. Their applications were rejected on the basis of their

⁵⁶⁹ *Watchenuka* supra note 67 at para 32.

⁵⁷⁰ Botha op cit note 62.

⁵⁷¹ *Khosa & Others v Minister of Social Development and Others* 2004 (6) SA 505.

permanent residence status. They thus challenged the decision, arguing that it infringed upon their constitutional rights not to be discriminated against unfairly and to social assistance.⁵⁷²

In addressing the question whether it was reasonable to exclude non-citizens from social assistance, given the *prima facie* entitlement in the constitution for ‘everyone to have access to social assistance’,⁵⁷³ the Court identified the following four factors as relevant: the purpose served by the social security assistance, the impact of the exclusion, relevance of the citizenship requirement, and the impact on other intersecting constitutional rights – in this case equality.⁵⁷⁴ It concluded that the purpose of social assistance was not only to ensure the availability of the basic necessities for everyone but also respect for the values of human dignity, equality and freedom.⁵⁷⁵ With regard to the issue of access to social grants, the Court held that differentiating on the basis of citizenship ‘must not be arbitrary or irrational or mark a naked preference’.⁵⁷⁶

The State submitted that permanent residents could apply for naturalisation and then become eligible for social grants and that they should therefore wait before applying for social assistance. The Court considered this and found that naturalisation was not guaranteed upon application. The Court also considered the financial burden on the State, but held that the State had not provided sufficient evidence to justify the claim that it could not afford

⁵⁷² Section 27(1) of the Constitution states that everyone has the right to have access to—

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Khosa* supra note 571 at para 49.

⁵⁷⁵ *Ibid* at para 52

⁵⁷⁶ *Ibid* at para 53.

extending social grants to eligible permanent residents. In the end, the Court chose to decide this case from an unfair discrimination perspective. Employing the proportionality analysis, it concluded that the impact of exclusion from social assistance on the life and dignity of permanent residents outweighed the financial and immigration considerations relied on by the State. This judgment is in line with *Watchenuka* which affirmed citizens and non-citizens were equal in dignity and had to be treated equally.

However, the Court in *Khosa* was careful in limiting the extension of social grants to those ‘who like citizens have made South Africa their home’.⁵⁷⁷ The concept of being tied to the citizenry, in other words, the level of attachment to the host State was crucial in the Courts determination to extend the granting of social assistance to permanent residents.⁵⁷⁸ The reason offered by the Court in *Khosa* was that permanent residents have demonstrated their ties to the South African society.

To this extent, this judgment is problematic in that it lays emphasis on the similarities between permanent residents and citizens, namely their immigration status, instead of considering their eligibility for social security based on their shared human dignity. The right of access to social assistance is recognised both under the South African Constitution and the ICESCR.⁵⁷⁹ Although States have at times used ‘progressive realisation’ to justify the exclusion of permanent residents and refugees, *Khosa* did not consider progressive realisation per se as the determining factor. Instead, this case was decided based on the ties permanent residents have to South Africa. Indeed, the majority judgment simply assumed that temporary residents do not have meaningful ties of allegiance or commitment to their country of

⁵⁷⁷ *Khosa* supra note 571 at paras 58-9.

⁵⁷⁸ Ibid.

⁵⁷⁹ OP cit note 241. South Africa signed the ICESCR in 1994 but has not ratified it yet. However, given that the socio-economic rights in the South African Constitution were modelled on those of the ICESCR, comments and analysis of the rights in the ICESCR are valuable to South African courts; See De Waal & Currie op cit note 65

residence.⁵⁸⁰ In a way then, this case suggests that asylum seekers and undocumented migrants are not eligible for social grants. The applicants for permanent residence may have been successful in this case but the Court has demonstrated that non-citizens can be excluded even if the right, in this case social assistance, is extended to everyone in the Constitution.⁵⁸¹

Although *Khosa* can be criticised for placing too much emphasis on affinity to South Africa and hence suggesting that temporary refugees might not be eligible for social grants, this case bodes well for refugees in a protracted situation simply because they will be able to demonstrate their ties to South Africa and prove that they have made South Africa their home.

The Social Assistance Act has since been amended and the benefits thereof have been extended to permanent residence and refugees.⁵⁸²

5.3. By Measuring the Level of Attachment to the Host State

In *Union of Refugee Women*,⁵⁸³ the applicants challenged their exclusion from working in the private security industry based on their refugee status. Here, the Constitutional Court adopted a more restrictive approach than that found in *Watchenuka* and *Khosa*. The Court restricted

⁵⁸⁰ L Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis (2005) 21 *South African Journal of Human Rights* 436.

⁵⁸¹ *Khosa* supra note 571.

⁵⁸² Lawyers for Human Rights 'Social Relief is Made Available for Vulnerable Refugees', available at <http://www.lhr.org.za/news/2012/social-relief-made-available-vulnerable-refugees>, accessed on 4 February 2017.

⁵⁸³ *The Union of Refugee Women and Others v The Director of the Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC).

the right to work in the security industry to citizens and permanent residents and held that this restriction did not violate the right of refugees to equality and non-discrimination.

The majority judgments' focus was on the State's power to make distinctions on the basis of citizenship or immigration, unlike the minority judgment which framed its inquiry in terms of South Africa's international commitment to refugees and the material disadvantage caused by their exclusion. The majority held that discrimination cannot impair the dignity of the refugee in a significant or substantial manner because the applicants could apply for an exemption and show good cause why they should be considered eligible for a job in the private security industry. The applicants were also not barred from seeking jobs in another industry. *Union of Refugee Women* is thus an illustration of how refugees are excluded from full belonging.

5.4 Conclusion

It is clear from the foregoing analysis that a balance needs to be found between a State's right to sovereignty and its inherent duty to provide for its citizens on the one hand, and the universality of human rights as found in international human rights law, refugee law, and the South African Constitution, which challenges the exclusion of non-citizens arising from territorial boundaries on the other hand. *Khosa* and *Watchenuka* demonstrated that the rights of the citizen are penetrable and can be extended to non-citizens. *Watchenuka* appealed to the common humanity in human beings and the right not to be humiliated to achieve this whilst *Khosa* relied on the level of attachment to the host State. *Union of Refugee Women* took a restrictive interpretation and denied access to refugees to work in the security service related economy.

It is, therefore, not enough to conclude that all the obstacles can be overcome by non-nationals with the use of the universal rights to dignity and equality for the full recognition of their humanity. These cases serve to highlight the tension between the universality of the rights to dignity and equality. Despite the fact that the Constitution guarantees most of the rights recognised in the Bill of Rights to ‘everyone’ or every child and the noble statements the Constitutional Court has made about human dignity and equality, the South African Courts have not consistently upheld these provisions in concrete cases concerning refugees.

This lack of application of the universality of human rights is not always apparent when refugees enter a territory for safety. However, when the emergency situation is over, refugees find themselves in protracted situations, because the tension between the rights to dignity and to equality for refugee and the citizen becomes more apparent. Even where the courts have relied on human dignity to traverse the tension between human rights and citizens’ rights, it has not been able to demonstrate that it can in all cases overcome the divide between the abstract rights of all human beings and the concrete rights of the citizen.⁵⁸⁴

Although the highest Courts in South Africa have been called upon to vindicate the rights of refugees, this thesis will demonstrate that refugees still struggle to live in the country with dignity.⁵⁸⁵

6. SOUTH AFRICA AS AN EXAMPLE OF URBAN REFUGEES IN A PROTRACTED SITUATION

The position of long-term refugees in South Africa requires special attention and ought to be a matter of considerable concern for the UNHCR and the South African government. Of the

⁵⁸⁴ Botha op cit note 62.

⁵⁸⁵ See chapter six for a detail discussion.

121 000 recognised refugees in South Africa,⁵⁸⁶ most of these are from Somalia and Congo. These refugees have been the targets of xenophobia for a number of years in South Africa and it has become clear that it is their ‘otherness’ that makes them targets. These refugees have been living in South Africa for five years or more after their initial displacement and are finding themselves in seemingly unending exile. This is precisely the type of situation that the UNHCR refers to as a protracted refugee situation.⁵⁸⁷ Somalis, in particular, have been living in South Africa as refugees since 1994 and are unable to return to Somalia where conflict and persecution persist. These refugees cannot go home because of the continuing nature of the conflict in their countries and none of the available rights of solution seem appropriate or attainable. Voluntary repatriation is clearly not a solution where the violence in the country is on-going, the UNHCR’s resettlement programme is not large enough to accommodate this entire class of refugees, and the third solution of permanent residence has been interpreted so narrowly that only a handful of refugees have benefited from this solution.

7. CONCLUSION

This chapter has traced the evolution of refugee law in South Africa by outlining its progress from its narrow race-based framework to placing human rights at the centre. It has demonstrated that the current legislative context is inclusive of everyone seeking asylum, unlike during Apartheid when it was race-based. It has also provided a general overview of the legislative framework within which refugees in South Africa are given protection and

⁵⁸⁶ UNHCR ‘The UNHCR Statistical Yearbooks’ (2015), available at <http://www.unhcr.org/pages/4a02afce6.html>, accessed on 11 July 2016.

⁵⁸⁷ Ibid.

care. It is evident that the current refugee laws in South Africa provide a generous measure of rights and that it compares favourably with international refugee and human rights law.

Whilst South African refugee law and policy recognises the temporary nature of refugeehood, it has not adequately contemplated the problem of a protracted refugee situation. Commendably, South Africa has adopted an urban policy as opposed to a camp-based one. However, it will be shown in chapter five that the South African government has not properly conceptualised the urban refugee policy and the outbreaks of xenophobic violence are in part attributable to this oversight. This chapter has also analysed the provisions of the Constitution including the provisions on human dignity and equality. The existing jurisprudence interpreting these provisions generally recognises the tension between the universality of human rights and their application to refugees and the States' duty to ensure the implementation of the rights to their citizens first.

CHAPTER FIVE

Local Integration as a Durable Solution

1. INTRODUCTION

The previous chapter established that refugee law in South Africa is informed by its constitutional values and commitment to international human rights law. As a result, South Africa has adopted a refugee policy that allows refugees to live amongst the local community in an urban environment rather than in refugee camps. This chapter examines South Africa's application of local integration as a durable solution for refugees in a protracted situation. How local integration is conceptualised and how is it implemented in practice?

In chapters three and four, it was argued that the formal recognition of the rights of refugees in international and domestic law is not enough to ensure that they enjoy these rights in practice. This chapter examines the limitations of local integration as a durable solution to refugees in protracted situations in South Africa by focussing on the obstacles encountered by refugees in obtaining documentation and the challenges they face in accessing basic services.

2. LOCAL INTEGRATION AS A RESPONSE TO PROTRACTED REFUGEE SITUATIONS

Local Integration is suggested by the UNHCR as a solution for refugees in protracted refugee situations in an urban environment.⁵⁸⁸ Chapter three established the three components of the

⁵⁸⁸ See A Fielden 'Local Integration: An Under Reported Solution to Protracted Refugee Situations' *New Issues in Refugee Research* (2008) UNHCR Research Paper No 158; A Jamal 'Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Programme in Kakuma, Kenya' *Evaluation and Policy Analysis Unit, UNHCR, Geneva* (2000); K Jacobsen 'The Forgotten Solution: Local Integration for Refugees in Developing Countries' *op cit* note 37 at 1.

local integration initiative. In the legal process, refugees are granted a progressively wide range of rights by the host State, commensurate with those enjoyed by its citizens; the economic process allows the refugees to become self-reliant and to contribute to the host State and in the socio-cultural process, refugees are accommodated by the local communities, which allows refugees to actively contribute to the social life of the country of asylum.⁵⁸⁹

The broad range of rights promised by the Refugees Act and the Constitution, and the fact that refugees are not confined to refugee camps, is an indication that the potential for local integration exists.⁵⁹⁰ The rights granted to refugees in South Africa should facilitate the legal integration of refugees.

Rights allow refugees to settle amongst the host population and have the potential to make refugees economically independent, thus enabling them to live meaningfully without international or government assistance. The provision of rights is clearly the first step toward the self-reliance of refugees. Once self-reliant, the quality of life of refugees would naturally improve, enabling them to make a positive contribution to the economy. As Crisp has stated:

The notion of ‘self-reliance pending return’ has advantages for all of the stakeholders in a protracted refugee situation. It would improve the quality of life for refugees, giving them a new degree of dignity and security. It would enable refugees to make a contribution to the economy of

⁵⁸⁹ UN High Commissioner for Refugees (UNHCR) ‘Global Consultations on International Protection/Third Track: Local Integration’, 25 April 2002, EC/GC/02/6, available at: <http://www.refworld.org/docid/3d6266e17.html>, accessed 9 December 2016.

⁵⁹⁰ See Refugees Act; L B Landau ‘Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy’ (2006) 19 *Journal of Refugee Studies* at 308; See also L B Landau & M Du Ponchel ‘Laws, Policies, or Social Position? Capabilities and the Determinants of Effective Protection in Four African Cities’ (2011) 24 (1) *Journal of Refugee Studies* at 17-18; T Greyling ‘The Expected Well-Being of Urban Refugees and Asylum-Seekers in Johannesburg’ (2016) 19 (2) *South African Journal of Economic and Management Sciences* at 232-248.

the host country and thereby make their presence a boon, rather than a burden, the local population.⁵⁹¹

Furthermore, for refugees to be able to integrate and live meaningful lives in South Africa, assurance of their physical safety is of paramount importance. The right to physical safety is clearly guaranteed by the Constitution.⁵⁹²

The socio-cultural process, generally, hints at a positive interaction with the local communities. It allows refugees to contribute actively to the social life of the country of asylum.⁵⁹³ The concept of social integration is, however, a contested one, with some scholars simply referring to it as the manner in which refugees relate to the social environment,⁵⁹⁴ whereas others, such as Valtonen,⁵⁹⁵ argue that social integration can take place between groups even when the groups maintain their separate identities. Kuhlman agrees with Harrell-bond's⁵⁹⁶ definition that integration is simply the co-existence between two groups and sharing of the resources.⁵⁹⁷

⁵⁹¹ J Crisp 'No Solutions in Sight: The Problems of Protracted Refugee Situations in Africa' (2002) Working Paper No 68 at 22.

⁵⁹² See section 12.

⁵⁹³ UNHCR Urban Policy *supra* note 480 at paras 14-17.

⁵⁹⁴ M Bulcha *Flight and Integration: Causes of Mass Exodus from Ethiopia and Problems of Integration in the Sudan* (1988) Uppsala [Sweden]: Scandinavian Institute of African Studies.

⁵⁹⁵ K Valtonen 'Resettlement of Middle Eastern Refugees in Finland: The Elusiveness of Integration' (1988) 11 (1) *Journal of Refugee Studies* at 40.

⁵⁹⁶ B Harrell-Bond *Imposing Aid: Emergency Assistance to Refugees* (1986) Oxford University Press: Oxford.

⁵⁹⁷ T Kuhlman 'The Economic Integration of Refugees in Developing Countries: A Research Model', available at <http://degree.ubvu.vu.nl/RePEc/vua/wpaper/pdf/19900035.pdf>, accessed 5 November 2016.

For the successful integration of refugees, all three aspects of local integration (legal, economic, and social) must be met and the host State must accept its responsibility.⁵⁹⁸ Jacobsen, in her study on local integration, argued that refugees are *de facto* integrated when they are not in physical danger; are able to sustain livelihoods through employment; and are socially integrated in the host State to the extent that there is no distinction between refugees and hosts.⁵⁹⁹

South Africa is thus well-placed for the successful local integration of refugees. The question, however, is whether local integration can be considered a *durable* solution if it does not change the legal status from ‘refugee’ to that of a member of the host State. None of the available scholarship or the UNHCR Conclusions equates local integration with permanent residence or citizenship.⁶⁰⁰ Local integration is clearly a less durable form of residence than permanent residence. It is conceded, however, that local integration is more durable than the status of a newly arrived refugee because of the rights acquired over time by the refugee. The refugee cannot, upon entry into an asylum State, be said to be locally integrated.⁶⁰¹

This chapter will investigate whether local integration can be considered a solution for refugees in protracted situations in South Africa. It is trite that refugee status must provide protection from immediate harm and ensure in the very least minimal protection by the host government of not being returned to the place of harm.⁶⁰² This chapter will, moreover, investigate whether the rights-based refugee status in South Africa, which grants a lot more than protection from immediate harm, guarantees access to and the enjoyment of these rights,

⁵⁹⁸ UNHCR Local Integration op cit note 586.

⁵⁹⁹ K Jacobsen op cit note 37 at 1.

⁶⁰⁰ Jacobsen op cit note 37; See also Hathaway op cit note 36.

⁶⁰¹ Ibid.

⁶⁰² Refugees Act at section 2.

and whether assimilation or local integration, as intended, can be considered to be adequate for refugees who live in this state of refugeehood in perpetuity.

3. LOCAL INTEGRATION UNDER THE REFUGEES ACT

Section 27 of the Refugees Act provides the legal basis for the integration of refugees in South Africa and hence paves the way to ending refugee status. It provides:

A refugee -

- (a) is entitled to a formal written recognition of refugee status in the prescribed form;
- (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;
- (c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;
- (d) is entitled to an identity document referred to in section 30;
- (e) is entitled to a South African travel document on application as contemplated in section 31;
- (f) is entitled to seek employment; and
- (g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

This section clearly recognises that refugees have a bundle of rights and entitlements that should allow them to meaningfully sojourn in South Africa. It also recognises that refugee status can change to the more durable immigration status of permanent residence. The purpose of this section was clearly set out in the 1997 Green Paper on International

Migration⁶⁰³ as being to allow refugees the right to sojourn meaningfully in South Africa and to acquire skills to empower themselves so that they can return to their countries of origin with dignity.⁶⁰⁴

Section 27 (b) of the Refugees Act very importantly states that refugees are entitled to the rights contained in the Constitution, save for those designated for citizens only, such as, the right to political participation. Moreover, sub-sections (f) and (g) deem the right to have access to education, healthcare, and employment to be so particularly important for the integration of refugees that they are re-codified in this section, even though they are already recognised in the Constitution.⁶⁰⁵

Significantly, sub-sections (a), (d) and (e) of section 27 recognise the necessity of formal recognition of refugee status and the need for refugees to be granted identity and travel documentation to enable them to live in South Africa and travel abroad and return.⁶⁰⁶ The formal identity documentation of refugees is of paramount importance because any foreigner who is unable to identify himself as being lawfully present in South Africa may be subjected to detention and other inconveniences. The Immigration Act allows for the deportation, detention and arrests of such persons. Indeed, such persons are moreover not allowed to work or seek any services in South Africa and those assisting them are liable to criminal prosecution.⁶⁰⁷ Without formal and written recognition, refugees are in exactly the same position as those who cannot prove their lawful stay. In *Kiliko*, the High Court described the prejudices and inconveniences that a foreigner, who cannot prove that he or she is legally in the country, faces:

⁶⁰³ 1997 Green Paper op cit note 440.

⁶⁰⁴ Ibid.

⁶⁰⁵ Refugees Act.

⁶⁰⁶ Ibid.

⁶⁰⁷ See sections 32, 33, 34, 39 and 42 of the Immigration Act 13 of 2002.

... he or she is subject to apprehension, detention and deportation in terms of sections 32, 33 and 34 of the Immigration Act. He or she may furthermore not be employed by anyone (s 38), may not be provided with training or instruction by any learning institution (s 39) and is, save for necessary humanitarian assistance, severely restricted as regards a wide range of activities that human beings ordinarily participate in, and all persons are prohibited from aiding, abetting, assisting, enabling or in any manner helping him or her (s 42), under pain of criminal prosecution.⁶⁰⁸

This case underlines the significance of formal documentation to the legal integration of refugees. Sub-sections (a), (d) and (e) of section 27 therefore play a vital role in the integration of refugees.

Section 27(c) of the Refugees Act provides that, after a period of five years, a refugee may apply for permanent residence under the Immigration Act.⁶⁰⁹ In the same way that the UN Refugee Convention provides for naturalisation as a means of ending refugee status, South Africa offers permanent residence should return of the refugee to the country of origin not be possible within a reasonable time.

The granting of permanent residence to a refugee is not, however, automatic: the refugee has to make an application and the adjudicator must make a decision based on the merits of the application and the factors set out in the Immigration Act. Amongst other things, the refugee must prove that he or she will remain a refugee 'indefinitely' and the Standing

⁶⁰⁸ *Kiliko* supra note 505.

⁶⁰⁹ The Refugee is directed to make this application for permanent residence in terms of the Immigration Act, replacing the Aliens Controls Act. Section 27 (a) of the Immigration Act states that: The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who (d) is a refugee referred to in section 27(c) of the Refugees Act 1998 (Act No 130 of 1998), subject to any prescribed requirement.

Committee of Refugee Affairs must certify that the refugee will indeed remain a refugee indefinitely.

South Africa offers a bifurcated approach to naturalisation whereby permanent residence must be sought first before naturalisation. While permanent residence is not the same as naturalisation, continuous stay as a permanent resident can in turn lead to naturalisation in terms of the Citizenship Act.⁶¹⁰

From this analysis, it can be argued that South African refugee law is strong at the level of guaranteeing formal integration. The law formally guarantees refugees a wide range of rights as has been shown above and in chapter four. In the following sections, this chapter considers whether this formal recognition of rights provides sufficient protection to refugees in a protracted situation.

4. BARRIERS TO LOCAL INTEGRATION AS A DURABLE SOLUTION

From the foregoing analysis of section 27, it can be concluded that local integration is an intended form of welcoming refugees to South Africa by the South African government.⁶¹¹ However, multiple barriers exist to the integration of refugees into South African society. Some are quite obvious, such as xenophobia and social exclusion, while others are less obvious, such as the barriers to their economic integration.⁶¹² Many other obstacles have also been identified that stem directly from the Refugees Act itself. Numerous examples of South

⁶¹⁰ Act 88 of 1995. Permanent residence and naturalisation are further discussed in chapter six.

⁶¹¹ Landau op cit note 481.

⁶¹² Ibid.

Africa's failure to implement the Refugees Act as well as the narrow interpretation of the terms used in the Refugees Act have also been identified as obstacles.

4.1. Lack of Policy

Although South African refugee legislation provides local integration to refugees there is no comprehensive policy to facilitate the legal, social, and economic integration of refugees. It could be argued that there is no need for a separate policy on socio-economic integration because it is implicit in the numerous rights offered by the Refugees Act and the South African Constitution. However, as has been shown in chapter three, mere formal guarantee of rights is insufficient for refugees to become fully integrated and for them to enjoy their rights in practice. Indeed, the lived experience of refugees, described later in this chapter, proves that such an assumption is wrong.⁶¹³

The preamble to the Immigration Act states that 'civil society should be educated on the rights of foreigners and refugees in South Africa'⁶¹⁴ and that xenophobia should be 'prevented and countered'.⁶¹⁵ However, the government has taken inadequate steps to ensure that these goals are achieved.

South Africa's adoption of a non-encampment policy means that refugees live amongst the local population and it has become evident that their presence has not been fully explained to the South African public. Government officials, as well as the South African public, need more information about the presence of refugees and how to engage them in all

⁶¹³ D Mavhinga 'Xenophobic Violence Erupts in South Africa' (2017), available at <https://www.hrw.org/news/2017/02/24/xenophobic-violence-erupts-south-africa>, accessed on 1 March 2017.

⁶¹⁴ Immigration Act.

⁶¹⁵ Ibid.

sectors of the South African society; whether in schools or the labour markets or healthcare and even in the justice system. The need for policies to explain the rights of refugees and their presence amongst the local population is essential to help create a welcoming society.⁶¹⁶ It is evident that many South Africans are unaware of the extent of the socio-economic rights afforded to refugees.⁶¹⁷ For example, refugees regularly note that prospective employers are unaware of their rights and of exploitation in the workplace and their inability to integrate economically, even though they have the right to seek employment.⁶¹⁸

The South African government needs to do more to demonstrate to South Africans that welcoming refugees is not only an international obligation but also a duty that stems from belonging to a common humanity.⁶¹⁹

As stated above, according to the Immigration Act South Africa is also obligated to counter and prevent xenophobia. South Africa has thus far been reactive in this regard, for example, by establishing an anti-xenophobia desk and xenophobia task team after the fact.⁶²⁰ The UNHCR's Urban Policy also urges the host State to foster good relations between refugees and citizens.

⁶¹⁶ UNHCR Urban Policy op cit note 480 at (f).

⁶¹⁷ I Palmary 'Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government Research Report' written for the Centre for the Study of Violence and Reconciliation, available at <http://www.csvr.org.za/docs/foreigners/refugeessafteyand.pdf>, accessed on 12 February 2017.

⁶¹⁸ D Dass K Ramjathan & F Khan 'The Socio-Economic Rights of Refugees and Asylum Seekers in South Africa' in F Khan & T Schreier op cit note 8 at 224.

⁶¹⁹ As done by the judiciary, see previous chapter, section 5.

⁶²⁰ 'National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016 – 2021', available at <http://www.gov.za/sites/www.gov.za/files/NAP-Draft-2015-12-14.pdf>, accessed on 14 February 2017.

4.2. Terminology: Asylum Seekers vs Refugees

The terminology used by the Refugees Act in its description of refugees as ‘asylum seekers’ is a huge obstacle to the protection of refugees in South Africa.⁶²¹ This is not a distinction made in international refugee law. It is obvious that a person fulfils the criteria of a refugee prior to formal recognition by a State.⁶²² Without formal recognition as a refugee, refugees are denied various rights offered by legislation.

The UNHCR has recognised the prejudice that refugees face if they are labelled as temporary asylum seekers until the State determines their status. It has therefore said that a person is a refugee as soon as he or she fulfils the criteria and that the host State merely declares him or her to be one. Paragraph 28 of the Handbook states that:

A person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.⁶²³

⁶²¹ Refugees Act at section 1 defines an ‘asylum seeker’ as a person who is seeking recognition as a refugee in the Republic.

⁶²² UNHCR Handbook op cit note 44 at para 28.

⁶²³ UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, available at <http://www.unhcr.org/4d93528a9.pdf>, accessed on 22 February 2017.

The term ‘asylum seeker’ is also increasingly being used in a pejorative sense.⁶²⁴ Feller, the former Assistant High Commissioner for Protection at UNHCR, wrote in 2005 that ‘refugees are not migrants ... it is dangerous, and detrimental to refugee protection, to confuse the two groups, terminologically or otherwise’.⁶²⁵ She made this statement in response to allegations that all refugees must at first be received as migrants, which is precisely the reason why the term ‘asylum seeker’ was introduced.

South Africa has included the term ‘asylum seekers’ in its legislation. In the Refugees Act, an asylum seeker is simply identified as a person seeking asylum.⁶²⁶ It is a very specific *temporary* legal status, and with this legal status are associated certain minimal rights, privileges and obligations. Most importantly, the Refugees Act does not afford asylum seekers the rights under section 27 of the Refugees Act – those rights are specifically reserved for recognised refugees.

This means that the Refugees Act deliberately sought to limit the rights of asylum seekers. Without an integration policy, and the fact that the Refugees Act differentiates between asylum seekers and refugees in terms of the rights they are entitled to, means that asylum seekers face more obstacles to be integrated. Thus, for as long as the refugees’ status is not determined, the refugee remains an asylum seeker and is therefore denied the rights under section 27 of the Refugees Act.⁶²⁷ Most prejudicial in the South African context is that refugees remain with this temporary status for a very long time.⁶²⁸

⁶²⁴ K Long ‘When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection’ (2013) 1 *Migration Studies* at 4–26.

⁶²⁵ E Feller ‘Refugees are not Migrants’ (2005) 24 (4) *Refugee Survey Quarterly* at 27–35.

⁶²⁶ Refugees Act at section 1.

⁶²⁷ Refugees Act at section 27.

⁶²⁸ R Amit ‘Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions’ (2010) Forced Migration Studies Programme Report: Johannesburg.

4.3. ‘Cumbersome Bureaucracy’

Some of the greatest obstacles to the enjoyment of rights by refugees include delays in processing asylum applications and procedural problems related to refugee recognition. Hathaway has argued that ‘South Africa has developed a multi-layered, bureaucratically cumbersome system for refugee assessment’.⁶²⁹ This system presents numerous problems for refugees to obtain recognition documentation and, hence, to access the rights the Constitution and Refugees Act promises.

From the very beginning, a lot is required of the vulnerable and often traumatised newly arrived refugee applicants. The individual applications must be made in person and the new applicants are required to complete a nine-page application form in English.⁶³⁰ Many refugees fail to complete these forms without the help of interpreters, who are in short supply,⁶³¹ despite the Refugees Act stating that interpreters must be made available by the Department of Home Affairs (DHA).⁶³² As a result, refugees are often unable to submit a comprehensive claim at this initial encounter with the refugee reception officer.⁶³³ Furthermore, refugees encounter inexperienced refugee status determination officers⁶³⁴ that often espouse an incorrect interpretation of the law⁶³⁵ and focus on irrelevant information. A

⁶²⁹ Hathaway op cit note 36.

⁶³⁰ Refugee Act Regulations op cit note 180 at BI-1590 form.

⁶³¹ Amit op cit note 165.

⁶³² Refugees Act at section 38.

⁶³³ Ibid at section 8 (2).

⁶³⁴ Ibid at section 8.

⁶³⁵ R Amit ‘All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination (2012) *African Centre for Migration and Society*.

combination of these factors is responsible for the large number of rejections of status at the first instance.⁶³⁶ Of the 60 642 asylum applications processed by the DHA in 2015, only 2499 were granted refugee status.⁶³⁷ This was the case even though a large number of refugees who sought asylum were from Somalia, the Eastern DRC and Eritrea, countries which are still involved in a conflict. The DHA maintained that all the rejected asylum seekers were economic migrants.⁶³⁸

These decisions can only be overturned on appeal or review by the Refugee Appeal Board and the Standing Committee established in terms of terms of the Refugees Act. The next step in seeking a remedy is through a long and expensive review process in the High Court.⁶³⁹ Highly prejudicial is the fact that refugees remain on these temporary asylum permits whilst the lengthy adjudication process is underway. The DHA in its 2016 parliamentary briefing noted that a total of 1 082 669 asylum applications in its backlog had been rejected over a period of 10 years by the refugee status determination officers and still needed to be assessed by the Standing Committee of Refugee Affairs and the Refugee Appeal Board.⁶⁴⁰

In addition, all the other services at the DHA, such as birth registration, the renewal of documentation, the replacement of lost or expired documents, the joining of families, require

⁶³⁶ Asylum statistics: Department Home Affairs briefing; Immigration Amendment Bill 2016 deliberations. In the 2015 calendar year, there had been 2 499 applications approved in terms of section 24(3)(a) of the Refugees Act, thus being recognised as genuine refugees. However, 14 093 applications were rejected as unfounded in terms of the same section, and there were also rejections in terms of section 24 (3) (b) numbering 64 abusive, 10 908 fraudulent or 33 078 manifestly unfounded applications, available at <https://pmg.org.za/committee-meeting/22163/>, accessed 3 February 2017.

⁶³⁷ Ibid.

⁶³⁸ Ibid.

⁶³⁹ C Hoexter *Administrative Law in South Africa* 2 ed (2012) Juta Co and Ltd: Cape Town (Lower courts in South Africa have no jurisdiction to hear judicial review applications).

⁶⁴⁰ Asylum Statistics op cit note 637.

direct engagement with the DHA. The bureaucratic system of the Refugees Act negatively affects the lives of refugees. Refugees find it physically and emotionally draining to queue all day and at times all night to access services.⁶⁴¹ These documents must be renewed in person at the office of initial application. Not only is this request costly, it also severely affects the daily lives of asylum seekers. School-going children are forced to miss at least four days of schooling per year, their parents struggle to find jobs because employers are reluctant to hire people whose legal status in South Africa is of limited duration. The psychological and emotional impact of the uncertainty of their status cannot be downplayed.⁶⁴²

Several studies have shown that the DHA has been unable to implement the Refugees Act fairly and abide by its Regulations.⁶⁴³ Most detrimental amongst these failures for refugees is the DHA's inability to abide by the timelines set in the Regulations for the adjudication of their refugee status. Even though the Regulations to the Refugees Act sets a time period of 180 days for the entire adjudication process to be completed, this timeline is seldom complied with.⁶⁴⁴ For instance, the study conducted by Amit demonstrated that in some cases it has taken 10 years to complete the refugee determination process instead of six months.⁶⁴⁵ Various studies have identified at least three reasons for the DHA's failure to abide by the

⁶⁴¹ L De la Hunt 'Tracking Changes Report' (2000) 7.

⁶⁴² G Mathonsi G Williams & C McConnell 'It's Not Just Xenophobia: Factors that Lead to Violent Attacks on Foreigners in South Africa and the Role of the Government' (2011), African Centre for the Constructive Resolution of Disputes, available at <http://www.accord.org.za/publication/its-not-just-xenophobia/>, accessed on 23 September 2016; Amit op cit note 632.

⁶⁴³ R Amit 'Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System' (2015) Report by Lawyers for Human Rights and The African Centre for Migration and Society; *Tafira v Minister of Home Affairs* (2006) Case No 12960/06 (TPD); *Kiliko* supra note 504.

⁶⁴⁴ Refugee Act Regulations in GN 366 GG 21075 at regulation 3 (1).

⁶⁴⁵ Amit op cit note 644.

stipulated timelines and failure to implement the Refugees Act: lack of capacity (with severe understaffing at all levels but in particular the adjudicating bodies of the Refugee Appeal Board and the Standing Committee for Refugee Affairs),⁶⁴⁶ corruption⁶⁴⁷ and xenophobia.

4.4. Xenophobia

Xenophobia is easily identified as evidence that refugees are failing to integrate into South African society. Official responses by government to the xenophobic attacks on refugees in South Africa in 2015 were puzzling to say the least. First, the government denied that there was a crisis, and then blamed criminal elements, and the victims.⁶⁴⁸ However, the South African⁶⁴⁹ perpetrators of the xenophobic violence claimed that the impetus for violence was their own.⁶⁵⁰ These were not random acts of criminality or spontaneous protests, but targeted violence at refugee owned small businesses. About 90 foreign owned businesses in Soweto, Gauteng were attacked.⁶⁵¹ These businesses were owned by foreigners of various African

⁶⁴⁶ *Kiliko* supra note 505 at para 29: 'It is, at least, implicit in the nature of the remedial steps already implemented or envisaged, as well as in Mr. Frazer's responses to the applicants' averments, that the policies and practices of which the applicants complained and acknowledged by him *are the result of a lamentable lack of capacity* on the part of his department to have taken steps efficiently to handle the volume of applications for asylum.'

⁶⁴⁷ Amit op cit note 644.

⁶⁴⁸ Staff Reporter 'Soweto: Violence Escalates between Locals and Foreigners' (2015) *Mail and Guardian*, available at <http://mg.co.za/article/2015-01-22-two-dead-foreign-owned-shop-burnt-in-soweto>, accessed on 14 July 2016.

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid.

⁶⁵¹ Ibid.

nationalities, but most by Somali nationals. This is the social climate that refugees face in South Africa.

Xenophobia is experienced by refugees at the hands of private individuals, public officials, and ordinary members of the South African public, the economically deprived, the uneducated and the economically powerful. Perpetrators of xenophobia can be found across the entire spectrum of South African society, which makes it difficult for refugees to integrate into South African society. The situation has not been helped by conflicting statements made by prominent government officials. For example, Minister Lindiwe Zulu boldly recently said:

Foreign business owners in South African townships cannot expect to co-exist peacefully with local business owners unless they share their trade secrets. Foreigners need to understand that they are here as a courtesy and our priority are to the people of this country first and foremost. They cannot barricade themselves in and not share their practices with local business owners.⁶⁵²

The Minister made this comment in spite of the fact that the Constitution guarantees everyone the right to freedom and security of person, which includes the right to be free from all forms of violence from either public or private actors.⁶⁵³ The right to security of person is not a conditional right as Minister Zulu states. Her remarks imply condonation of violence and criminality, which is inconsistent with our Constitution.

⁶⁵² 'Minister Lindiwe Zulu to Foreigners', *Radio 702*, 28 January 2015, available at <http://www.702.co.za/articles/1505/zulu-foreign-business-owners-must-share>, accessed on 14 July 2016.

⁶⁵³ Section 12.

On the other hand, Minister of Home Affairs Naledi Pandor said that⁶⁵⁴ the use of force or threats of violence to resolve grievances in South Africa were unacceptable:

Anti-immigrant violence is inseparable from the evil of racism. The insidious nature of rising levels of ethnicism in our society is another cause for concern. We need to re-commit to the non-racialism we believed in during the days of our struggle against apartheid. We need to teach our young people to recognise bias, intolerance, and racism and arm them with the skills to combat these forms of discrimination.⁶⁵⁵

According to her, more is needed to raise public awareness about the value of diversity and the advantages of living with people from different cultures and that South Africa will not shirk from its responsibilities under our refugee law or international conventions.⁶⁵⁶

Refugees experience xenophobia in various forms in South Africa, from the mere name-calling, such as *makwerekere* (a derogatory term directed specifically at black foreigners) to the actual physical violence resulting in death. Within this spectrum are various forms of harm that refugees experience, such as economic exploitation, social exclusion, and institutionalized prejudices that hamper their integration into the local communities and stop them from living a meaningful existence in the country.

The failure to implement the Refugees Act has been described as institutionalised xenophobia⁶⁵⁷ and the lack of political will to assist refugees.⁶⁵⁸ Refugees relate that at every

⁶⁵⁴ 'Africans Should Stand Together – Pandor', *News 24*, 20 June 2013, available at <http://www.news24.com/SouthAfrica/News/Africans-should-stand-together-Pandor-20130620>, accessed on 14 July 2016.

⁶⁵⁵ *News 24*, op cit note 655.

⁶⁵⁶ Ibid.

⁶⁵⁷ Staff Reporter op cit note 509.

level of interaction with the DHA they are treated poorly by officials, who often make arbitrary and unlawful decisions in the face of clear policy and legislation.⁶⁵⁹ The DHA officials arbitrarily deny refugees access to the asylum system, refuse extensions of permits and are generally slow and inefficient,⁶⁶⁰ act maliciously and with impunity against foreigners. This behaviour is designed to keep the foreigner out ('gatekeeping'), rather than to welcome them by creating a fair and transparent process.

Refugees have reported bad experiences in their interaction with police as well, such as brutal attacks by the police,⁶⁶¹ or the police standing by while third parties loot and destroy shops owned by foreign nationals.⁶⁶² Refugees also experience discrimination from employers and landlords and the public generally.

Various barriers to health care have been noted by refugees and this has led to a psychological fear of the public health care system with refugees resorting to avoiding it. A 2011 SAMP study found that xenophobia by medical personnel existed and manifested itself in various ways,⁶⁶³ such as the requirement that refugee patients produce documentation and proof of residence status before being given treatment. The refusal by health care professionals to communicate in English or allow translators was documented, as well as xenophobic insults and verbal abuse. This study also noted that non-South African patients

⁶⁵⁸ Landau op cit note 481.

⁶⁵⁹ Case on file with author.

⁶⁶⁰ Case on file with author.

⁶⁶¹ Case on file with author.

⁶⁶² *Said and Others v Minister of Safety and Security* (EC13/08) (unreported).

⁶⁶³ J Crush & W Pindleton 'Regionalising Xenophobia? Attitudes to Immigrants and Refugees in SADC' (2004), Southern African Migration Policy Series.

were required to wait until all South African patients were assisted. Crush⁶⁶⁴ and Tawadzero⁶⁶⁵ relate further examples of the manner in which refugees have been excluded from the public health care system.

These experiences prove that simply guaranteeing rights on paper does not guarantee the enjoyment of these rights in practice. Despite being resident in South Africa for a protracted period of time, refugees are considered ‘other’ because of their refugee status. Ending refugee status can help to change this situation.

Klaaren has argued that the issue of xenophobia can be used to explore the ‘development of themes of citizenship’ in South Africa.⁶⁶⁶ According to him, one view sees violence as the ‘natural result of apartheid deprivations and its refusal to share the spoils with respect to those from outside the borders’. The second view is more ‘empirically informed’, and sees xenophobic violence as a constitutive struggle over the current meaning of South African citizenship’.⁶⁶⁷ It raises the question of whether citizenship is viewed as exclusive membership in a community, that is, membership in a political republic or membership in a cultural bloc, or whether it is conceived of as ‘constitutional citizenship’, that is, that lawful residence entitles one to the universal human rights culture.⁶⁶⁸

As long as refugees are seen as the ‘other’ and cannot claim a legitimate right to stay, they will remain prone to xenophobia, they will struggle to integrate, and they will continue to face various kinds of prejudice and marginalisation.

⁶⁶⁴ J Crush & G Tawadzero ‘Medical Xenophobia and Zimbabwean Migrant Access to Public Health Services in South Africa’ (2014) 40 *Journal of Ethnic and Migration Studies* at 655-670.

⁶⁶⁵ Ibid.

⁶⁶⁶ J Klaaren ‘Constitutional Citizenship in South Africa’(2010) 8 (1) *International Journal of Constitutional Law* at 94-110.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid.

5. PROBLEMS RELATED TO THE SOCIAL AND ECONOMIC INTEGRATION OF REFUGEES IN PROTRACTED SITUATIONS

According to the UNHCR, the rights necessary for the local integration of refugees are the rights to freedom of movement, access to education and the labour market, access to public relief and assistance including health facilities, to acquire and dispose of property, to travel, to identity documents and to family unity.⁶⁶⁹ Refugees have been guaranteed all of these rights in South Africa as shown in chapter four.⁶⁷⁰ This section considers, in particular, the obstacles encountered by refugees in obtaining documentation and, as a result, the challenges they face in accessing basic services.

In South Africa, the refugee document entitles the holder to a variety of rights and benefits. Most importantly, it entitles the holder to sojourn legally in the country. However, refugees are struggling to access these documents and, when they have obtained these documents, the documents themselves serve to alienate them even further.

5.1. The Right of Access to Documents

The refugees' struggle to access documents in South Africa can be demonstrated through a plethora of cases undertaken against the DHA, the government department responsible for the issuance of these documents.

⁶⁶⁹ UNHCR Urban policy op cit note 480.

⁶⁷⁰ See chapter four of this thesis.

In *Kiliko*⁶⁷¹ and *Tafira*,⁶⁷² the High Court in the Western Cape and Gauteng, respectively, held that the DHA did not adequately capacitate the Refugee Reception Offices, hence denied access for refugees to asylum, leaving them undocumented and vulnerable to arrest and deportation.⁶⁷³ In *Kiliko*, one of the first cases dealing with the right to documentation, the Court explained the significance of the right to documentation appropriately thus stating;

Until an asylum seeker obtains an asylum-seeker permit in terms of s 22 of the Refugees Act, he or she remains an illegal foreigner and, as such, subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which, self-evidently, impact deleteriously upon or threaten to so impact upon, at least, his or her human dignity and the freedom and security of his or her person.⁶⁷⁴

In *Minister of Home Affairs and Others v Somali Association of South Africa, Eastern Cape*, the DHA's decision to close the Port Elizabeth Refugee Reception Office to new asylum applicants, because the DHA intended to reduce the presence of refugees in the major metropolitan areas and move them to the borders was challenged.⁶⁷⁵ The Supreme Court of Appeal held that the office should be reopened. However, the DHA has not yet reopened that office. The Refugee Reception Offices in Cape Town and Johannesburg have also been closed to new applicants. Consequently, refugees can only make new asylum application in

⁶⁷¹ *Kiliko* supra note 505.

⁶⁷² *Tafira* supra note 644.

⁶⁷³ *Kiliko* supra note 505.

⁶⁷⁴ *Kiliko* supra note 505 at para 7.

⁶⁷⁵ *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape* (SASA EC) and Another (831/2013) [2015] ZASCA 35; 2015 (3) SA 545 (SCA); *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (11681/12) [2013] ZAWCHC 49, *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* (735/12, 360/13) [2013] ZASCA 134; 2013 (6) SA 421 (SCA).

Durban, Pretoria and Musina, thus restricting access to the asylum system. The Durban and Pretoria Reception Offices have indicated that they have been unable to cope with the numbers of applicants since the closure of the three reception office.⁶⁷⁶

After the closure of the three refugee reception offices, *Abdulaahi*,⁶⁷⁷ launched in Cape Town, tackled the introduction of the practice by the DHA that forces refugees to return to the refugee reception office of initial application for the renewal of their asylum documentation. For various reasons related to their family, employment or safety, many refugees have made their homes elsewhere in South Africa and are finding it difficult to travel with their entire families four times a year to the original office to renew their documents. Refugees and asylum seekers who do not have the means to travel long distances to the office of original application find themselves with expired permits and face arrest and deportation. The High Court in the Western Cape held that the applicants can access services at the Cape Town Refugee Reception Office but limited the right to access services only to the applicants listed in this case.

This necessitated the launching of *Nbaya*, which also dealt with the issue of forcing refugees to return to the office of initial application for services.⁶⁷⁸ This issue was raised in several cases previously with exactly the same outcome; that refugees irrespective of office of application were allowed to have access to services at the Cape Town Refugee Reception

⁶⁷⁶ L Sello 'SA Asylum Seekers, Refugees' Policy on Focus', available at <http://www.enca.com/south-africa/sa-asylum-seekers-refugees%E2%80%99-policy-%E2%80%93focus>, accessed on 1 March 2017; See also <http://www.sanews.gov.za/south-africa/extended-hours-refugee-reception-offices>, accessed on 2 March 2017.

⁶⁷⁷ *Abdulaahi and Others v The Director General of Home Affairs and Others* Case 7705/2013. This case had 1 223 applicants.

⁶⁷⁸ *Nbaya and Others v Director General of Home Affairs* 6534 /15 (unreported). This case started with 450 applicants and a further 2500 applicants joined later.

Office.⁶⁷⁹ This practice by the DHA has clearly affected the refugees' right to choose their place of stay in South Africa, thereby curbing their freedom of movement. It has also meant that refugees in these categories have only managed to remain documented as a result of legal intervention.

In *Bukasa*, the issue of expired permits was addressed. Refugees were forced to pay administrative fines or face arrest for expired permits.⁶⁸⁰ These fines were often issued unlawfully as the permit expiry was due to no fault of the person concerned (e.g. someone may be injured and hospitalised, or someone who attended on the expiration date may have been told by a DHA official to come on a later date for renewal). Some refugees opted to admit guilt and paid the fine because the prejudice of remaining with expired permits was too great. This admission of guilt created a further barrier to asylum seekers and refugees who later applied for permanent residence or had to travel and found to their chagrin that their criminal record precludes both. These fines were set at R2 000 per person, and those who were unable to pay were arrested and left undocumented. *Bukasa* was launched by the UCT Refugee Rights Clinic and resulted in a settlement with the DHA to stop the unlawful and issuance of fines in cases where the refugees and asylum seekers had just cause for an expired permit.⁶⁸¹

Asylum seeker permits are issued for short periods of three month by the DHA. The backlog at the various stages of the status determination process at the DHA has led to the multiple extensions of documents; a practice the asylum seekers have no control over.

⁶⁷⁹ See eg *Hirsi and Others v Minister of Home Affairs* (WCHC 16863/08); *Thomasso and Others v Minister of Home Affairs and Others* (WCHC 10598/09); *Ahmed Abdi Aden and Others v Minister of Home Affairs and Another* (WCHC 9179/11); *Abdulaahi and others v Director General of Home Affairs and Others* 7705/15 (unreported); *Nbaya and Others v Director General of Home Affairs* 6534 /15 (unreported).

⁶⁸⁰ *Bukasa v Minister of Home Affairs* 22197 /10 Western Cape High Court (unreported).

⁶⁸¹ Refugees Act at section 37.

However, in 2013, the DHA introduced a requirement that asylum permits would be extended no more than twelve times. This practice was introduced even though asylum permit extensions are done at the behest of the DHA. This arbitrary practice left many asylum seekers with expired documents and formed the basis of *Bahamboula*.⁶⁸² After the case was launched by the UCT Refugee Rights Clinic, the 316 applicants were documented and the practice withdrawn.

In *Mwamba*,⁶⁸³ the practice of the DHA to leave refugees undocumented whilst the DHA conducted investigations into irregularities picked up on its computer system (with regard to finger printing, identity photographs, duplication of files or other administrative errors) was challenged. Once again, large numbers of refugees were left undocumented and only legal intervention led to the abandonment of the practice.

These cases demonstrate that despite having the legal right to documentation, refugees are failing to access these documents due in large part to various *ad hoc* administrative practices at the DHA.

5.2. The Right to Enabling Documents

In addition to the difficulties refugees face in accessing documentation, it must be noted that the identity documents that are issued to refugees are markedly different from those issued to South African citizens or permanent residents.⁶⁸⁴ The purpose may of this differentiation may

⁶⁸² *Bahamboula and Others v Minister of Home Affairs and Others* (1476/14) [2014] ZAWCHC 69; 2014 (9) BCLR 1021 (WCC).

⁶⁸³ *Mwamba and others v The Department of Home Affairs and Others* Case No 14820/15, (unreported).

⁶⁸⁴ Refugees Act at section 22 (temporary asylum document); section 24 (refugee status document); section 27 (travel and identity document), section 23 (immigration document).

be that the government can impose order on society: the government can plan for the benefit of the holders or the identification of refugees to distinguish between who is the holder of rights and who is not.⁶⁸⁵ On the other hand, it may serve as a form of control so that government can deport asylum seekers whenever it feels necessary to do so.

The issue of the documentation of refugees in South Africa has been described by Amit et al in terms of the ‘street-level organisational approach’, which emphasises how administrative practices, including those relating to documentation, shape politics and create policy.⁶⁸⁶ The essence of the street-level organisational approach is the recognition that administrative practices may determine who gets access to organisational benefits and who is excluded.⁶⁸⁷ These practices are often hidden from public view, and thus tend to be less transparent than legislative processes that are conducted in the open.⁶⁸⁸ Thus, organisational practices are central to understanding, access to benefits and, its antithesis, exclusion. Importantly, the street-level approach does not assume that administrative exclusion, the denial of benefits to those who are eligible, is necessarily the product of intentions.⁶⁸⁹ Instead, it highlights how administrative exclusion often occurs as a result of the practices, intentional

⁶⁸⁵ R Amit & N Krigler ‘Making migrants ‘il-legible’: The Policies and Practices of Documentation in Post-Apartheid South Africa’ (2014), available at http://www.scielo.org.za/scielo.php?pid=S0259-01902014000100012&script=sci_arttext&tlng=pt, accessed on 21 July 2016.

⁶⁸⁶ Ibid.

⁶⁸⁷ Ibid.

⁶⁸⁸ E Z Brodtkin & G Marston (eds) *Work and the Welfare State: Street-Level Organizations and Workfare Politics* (2013) Georgetown University Press: Washington, DC. Brodtkin captures the core elements of street-level approaches as follows: ‘... organizations do more than apply the law. They also engage in informal and discretionary practices that effectively make the law, essentially constituting an extra-legal mode of determining who gets what and how.’

⁶⁸⁹ Amit & Krieger op cit note 686.

or not, employed by those who interpret and apply eligibility criteria as they adjudicate claims for benefits.⁶⁹⁰

The various forms of documentation lend themselves to administrative practices that could easily lead to the exclusion of refugees from benefits. The specific document that refugees receive, for example, has restricted access to the two rights most necessary for the refugee to become self-reliant: the right to work and the right to education. The refugee status permit is issued in terms of Section 24 (3) (a) of the Refugees Act.⁶⁹¹ This document is issued with no regard to the refugees' right to work.⁶⁹² Refugees struggle to access employment because refugee status documents are usually valid for a limited period, mostly two years for recognised refugees (section 24) and three months for asylum seekers.⁶⁹³ The limited duration clearly impacts negatively on the right to work because it prejudices refugees and asylum seekers from permanent employment.

Even when the refugee documents are accepted by employers, various issues such as access to banking⁶⁹⁴ or access to the unemployment insurance or provident funds arises.⁶⁹⁵ Similarly, the refugee documentation has impacted on the refugees' education. The short duration of refugee and asylum seeker status makes it difficult for them to obtain admission

⁶⁹⁰ Ibid.

⁶⁹¹ Refugees Act at section 24 (3) (a).

⁶⁹² Residence permits issued generally indicate the right to work attached to it.

⁶⁹³ De La Hunt op cit note 641.

⁶⁹⁴ *Consortium for Refugees and Migrants in South Africa v ABSA Bank Limited* SGNC Case No 34220/2010 (unreported).

⁶⁹⁵ F Khan & T Schreier op cit note 618 at 233.

or continue their studies at universities.⁶⁹⁶ This shows that refugee documentation itself negatively impacts on the social and economic integration of refugees.

Even the education of refugee children is threatened, despite the fact that all children have the constitutional right to basic education. Refugee children who fail to obtain documentation or keep them renewed are at risk of arrest. Recently, for example, a Gauteng school issued a letter to all parents of foreign children stating: ‘If any foreign child arrives here on Monday we will phone the police to come and collect your child and you can collect your child at the police station. These are direct instructions from the Department of Home Affairs.’⁶⁹⁷

Documentation and registration of refugees may be an important component of local integration, but for as long as the documents issued to refugees are not enabling documents it considerably weakens the concept of local integration as a solution for refugees in a protracted situation.

5.3. Failure to Enjoy Other Rights

One crucial way that the rights-based approach can help refugees in a protracted refugee situation is by assisting refugees become self-reliant. South Africa evidently allows a refugee whose claim for asylum has been successfully adjudicated to seek and take up employment. Section 27(f) of the Refugees Act states that ‘a refugee is entitled to seek employment’.⁶⁹⁸

⁶⁹⁶ R Browne ‘The Right to Education for Refugees and Asylum Seekers in South Africa’ LLM Thesis, University of Cape Town (2013) at 39.

⁶⁹⁷ N Goba ‘Outrage over School Letter Threatening to Bar Pupils with Foreign Parents’, available at <http://www.timeslive.co.za/local/2017/02/24/Outrage-over-school-letter-threatening-to-bar-pupils-with-foreign-parents>, accessed on 17 February 2017.

⁶⁹⁸ Refugees Act at section 27 provides further entitlements to refugees, such as the right to an identity document and a travel document.

Apart from the issues with regard to documentation, refugees ‘face language difficulties, educational differences, certification requirements, cultural barriers and xenophobic and racist barriers to work’.⁶⁹⁹ In South Africa, due to the above social barriers many refugees find themselves channelled into low-paying and insecure jobs. Assistance to overcome such barriers therefore needs to be better organised and on a much bigger scale than is currently taking place, whether by the UNHCR or the South African government.⁷⁰⁰

Refugees also have the legal right to basic education which includes access to the public schooling system and the right to access school programs, such as feeding schemes and school fee exemptions. While in the past some schools did not grant children of refugees fee exemptions if they were unable to pay, such discrimination has lessened in the main urban areas due to advocacy by NGOs.⁷⁰¹ Nonetheless, a significant proportion of refugee children are not in school and refugee parents do not know about the fee exemption.⁷⁰²

It is taken for granted that one’s level of economic growth is linked to one’s quality of education and training. Refugees in South Africa are struggling to access tertiary education. Many of the refugees would have qualified for financial assistance from the government but for their refugee status. Few university scholarships are offered to refugees by UNHCR in South Africa.⁷⁰³

⁶⁹⁹ D Dass et al op cit note 618 at 233.

⁷⁰⁰ By UNHCR partners and other NGO’s such as Scalabrini and ARESTA. However, these programmes are so limited and on such a small-scale that they provide very little impact.

⁷⁰¹ M Makhema ‘Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community’ (2009) SP Discussion Paper No 0906.

⁷⁰² Ibid.

⁷⁰³ UNHCR – DAFI Scholarships, available at www.unhcr.org/dafi-scholarships.html, accessed on 12 February 2017. The UNHCR’s higher education scholarship programme, best known by its acronym DAFI, plays an integral role in enabling refugees worldwide to access higher education.

Refugees do have access to basic health care in South Africa through the public health care system of clinics and hospitals. However, they face many challenges within the health care system, especially by frontline administrative staff as a result of their documentation. Since their documentation gives no indication of their right to health care, refugees are often excluded or are forced to pay. Scholars such as Schneider⁷⁰⁴ and Gulliford⁷⁰⁵ have argued that access is an instrumental and intermediate goal of health care systems. Refugees are denied health care services in order to save resources for nationals according to Rosencrantz⁷⁰⁶ and Schwartz.⁷⁰⁷ For example, a Somali girl was denied a kidney transplant purely on the basis of her refugee status.⁷⁰⁸

In South Africa, since refugees are not camp-based, one of the most pressing initial needs for newly arrived refugees is finding accommodation. Even though South Africa has identified refugees as a vulnerable group, there is no special right with regard to housing for refugees. In fact, the National Housing Code explicitly excludes migrants from government housing subsidies.⁷⁰⁹ When compared to international law, the right to have access to housing

⁷⁰⁴ H Schneider et al 'Health Systems and Access to Antiretroviral Drugs for HIV in Southern Africa: Service Delivery and Human Resources Challenges' (2006) 14 *Reproductive Health Matters* at 12-23.

⁷⁰⁵ M Gulliford et al 'What does Access to Healthcare Mean?' (2002) *Health Serv Res Policy* at 186-8.

⁷⁰⁶ B Rosencrantz (2013) in G Zihindula et al 'Access to Health Care Services by Refugees in South Africa: A Review of Literature' (2015) 16 *Southern Africa Journal of Demography* at 7-35.

⁷⁰⁷ Schwarz (2001) in G Zihindula *ibid*.

⁷⁰⁸ Case on file with author.

⁷⁰⁹ J Greenberg & T Polzer 'Migrant Access to Housing in South African cities' (2008) Forced Migration Studies Programme University of Wits; Hathaway *op cit* note 93 at 481 'In countries including Austria, Canada, France, New Zealand and Spain refugees have access to subsidised public housing on the same terms as citizens.'

under the South African Constitution is more robustly protected than under the ICESCR.⁷¹⁰

The Constitutional Court in *Government of the Republic of South Africa v Grootboom* held:

It recognises that housing entails more than just bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of the sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions must be met: there must be land, there must be services, there must be a dwelling ... The State must create the conditions for access to adequate housing for people at all economic levels of our society.⁷¹¹

Refugees in South Africa are effectively denied housing assistance by the government because they are specifically excluded from the National Housing Code.⁷¹²

The right to freedom of movement is central to facilitating the social and economic integration of refugees. This right is recognised by the Constitution.⁷¹³ There are, however, indications that though the right exists in law, the recent actions and statements of the DHA will lead to a severe restriction of this right in the foreseeable future. The DHA's recent decision to relocate all Refugee Reception Offices to the northern land borders of the country⁷¹⁴ and the decision to deny services to refugees and asylum seekers, except at the

⁷¹⁰ Article 11 states: 'The States party to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate housing ...'

⁷¹¹ 2000 (11) BCLR 1169(CC) at para 35.

⁷¹² National Housing Code (2000, revised in 2009).

⁷¹³ See section 21(1).

⁷¹⁴ *Scalabrini* supra note 676, which involved the Cape Town Refugee Reception Office.

Refugee Reception Office where they were first issued with their asylum permits,⁷¹⁵ are stark examples of the government's curbing of the right to freedom of movement.

Legislation⁷¹⁶ also allows for the issuance of a travel document by the HDA to refugees permitting them to travel outside the country. In spite of refugees being able to access travel documents in South Africa, it does not necessarily ensure their freedom of movement. This is the case because most countries of the North do not extend visas to refugees. Refugees in protracted situations are thus effectively denied the right to travel from South Africa. The fact that local integration does not culminate in membership of the South African community means that the movement of refugees in a protracted situation within and outside of South Africa is unduly restricted.

The Refugees Act does not have a specific provision on the right to family unity, but this right is impliedly recognised through various other sections in the Act. For example, South Africa affords derivative status to the dependants,⁷¹⁷ which automatically includes immediate members of family. Respect for the family as a unit is evident in this section. Similarly, the right to family is implied in the Constitution under section 28 which enshrines the child's right to family care. Lastly, in *Dawood v Minister of Home Affairs*,⁷¹⁸ the Constitutional Court held that the right to dignity must be interpreted to afford protection to the institutions of marriage and the family.

⁷¹⁵ *Abdulaahi* supra note 678.

⁷¹⁶ Refugees Act at section 27.

⁷¹⁷ Refugees Act at section 1 (ix) "dependant", in relation to an asylum seeker or a refugee, includes the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee.

⁷¹⁸ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

Many practices of the DHA described earlier in this chapter constitute a violation of these rights.⁷¹⁹ It can therefore be concluded from this discussion that the rights afforded to refugees have not been implemented in a manner that takes into account their changing needs. The longer the refugee is in a host country, the greater the need for more permanent forms of housing, higher education, travel, or healthcare. It is also common that the principal refugee applicant is joined by families at a later time.⁷²⁰ These have not been factored into South Africa's grant of rights to refugees. Many refugees in protracted situations are therefore increasingly feeling alienated in South Africa. Although they clearly have rights, the longer they stay in South Africa the more they fail to integrate and live meaningful lives. Refugees are unable to escape from poverty because they live in conditions of insecurity, and because they are unable to fully realise their basic rights.

6. THE INADEQUACY OF LOCAL INTEGRATION AS A DURABLE SOLUTION FOR REFUGEES IN A PROTRACTED SITUATION

Although refugees have been granted a range of rights in South Africa, as was shown in chapter four, this chapter demonstrates how in practice refugees face challenges to accessing and enjoying those rights. The lack of a clear and comprehensive policy has clearly hampered their integration.

One of the reasons why local integration is not an effective durable solution for refugees in protracted refugee situations lies in the fact that it does not change the status of a refugee and, as a result, the refugee is not regarded as a member of the local community. Although a

⁷¹⁹ *Scalabrini Centre v Minister of Home Affairs* (WCC) Case No 5242/16 (ongoing).

⁷²⁰ Jastram op cit note 358.

protracted refugee situation has arisen in South Africa, it has not yet been acknowledged as a problem by the UNHCR or the South African government.

Not only have South African law makers not considered and, therefore not included, solutions for long-term refugees into South African law, refugees themselves also have not been able to highlight the urgency of their situation in the urban environment, because they have not found a legal avenue to express the human rights consequences faced by them in South Africa.

This thesis argues that membership of a political community is crucial to the effective protection of one's dignity. The marginalisation, prejudices and discrimination refugees in South Africa face can be seen as a direct consequence of their alienation from South African society. Kidd-White states that dignity allows one to communicate something that the language of human rights cannot, and that it therefore has an extraordinary role to play in legal considerations.⁷²¹ Many have suggested that it is difficult to understand how the concept of dignity should inform the practice of human rights adjudication.⁷²² There is a growing school of thought that a person's emotions can be used to shape decision-making in spite of the well-known tools of rationality and reasonableness.⁷²³ According to this view, adjudicators can have a better sense of the way human dignity is violated if the evidentiary record in a rights case evokes horror or anger over the treatment of the claimant.⁷²⁴ Furthermore, Kidd-White claims that emotion can permit and communicate certain dexterity with concepts that may otherwise appear to be abstract.⁷²⁵

⁷²¹ E Kidd-White 'Till the Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims' (2014) 3 *Journal of Law, Religion, and State* 201 – 239.

⁷²² Ibid.

⁷²³ Ibid.

⁷²⁴ Ibid.

⁷²⁵ Kidd-White op cit note 721.

Khaitan is of the same view and describes the concept of dignity in human rights law as an expressive norm.⁷²⁶ Khaitan argues that ‘whether an act disrespects someone’s dignity depends on the meanings that act expresses’.⁷²⁷ Does the legislation demean, degrade, or humiliate the person under its authority? The right to dignity takes seriously the expression of disrespect, insult or humiliation to a person or object. The emotions expressed or articulated by the person is one way of establishing whether the person feels disrespected, insulted or humiliated by the act. Dignity is about worth and respect and the right to dignity is in part whether this worth is recognised by the State.⁷²⁸ The emotion expressed by the victim thus helps to orientate the adjudicator, because if the victim feels insulted, humiliated or disrespected by the laws, only then can the adjudicator assess whether the law protects the dignity of the person. Kidd-White, furthermore, states that we can expect emotions like indignation, empathy, and pity to draw out the content of human dignity. Many of these are painful emotions that respond to evidence of human rights abuse.⁷²⁹ Emotions can, therefore, help the judges understand what the legal concept of human dignity was supposed to protect.

Similarly, if the emotions of the long-term refugees are understood, then it will be known what the legal concept of dignity was supposed to protect. One way for the plight of refugees in protracted situations to be realised is if an avenue can be found for them to demonstrate the negative effect thereof on their dignity. This chapter has shown that in spite of the generous laws for refugees in South Africa, refugees have remained outsiders. The extent to which refugees in protracted situations in South Africa ‘feel insulted, humiliated and not respected

⁷²⁶ T Khaitan ‘Dignity as an Expressive Norm: Neither Vacuous nor Panacea’ (2012) 32(1) *Oxford Journal of Legal Studies*.

⁷²⁷ Ibid.

⁷²⁸ Ibid.

⁷²⁹ Kidd-White op cit note 726.

by the laws'⁷³⁰ is yet to be clearly established. It is however obvious from the above discussion that refugees are unable to live meaningful lives in South Africa.

7. CONCLUSION

Refugees in South Africa are not enjoying the generous rights granted to them and struggling to integrate largely because the wider South African society has been unable to accept or understand that refugees can have the same entitlements as South Africans. The South African government, according to the UNHCR's Urban Policy, has an obligation to foster relations between refugees and South Africans for the successful social integration of refugees. This has not happened. For example, South African employers, or health care professionals or educators and various other administrators, have not been familiarised with the rights or the legitimate presence of refugees in South Africa. South Africa has not developed clear social and economic policies to facilitate their integration.

Because of South Africa's failure to implement the Refugees Act and its inability to abide by the set timelines, refugees have remained with temporary documentation for a long time. The 2009 Conclusion on Protracted Refugee Situations has recognised that a refugee who has been in the country for more than five years since the initial displacement without a durable solution in sight is in a protracted situation. Many refugees in South Africa are in such a situation.

The chapter has also demonstrated that in spite of the formal recognition of the rights of refugees, refugee status actually hampers the full integration of refugees. Other obstacles to integration include lack of clear policy to facilitate integration, administrative inefficiencies in the processing of documents and inconsistent government practices toward refugees.

⁷³⁰ Khaitan op cit note 726.

Significantly, local integration cannot be considered a durable solution as long as it does not end the status of the refugee. The next chapter discusses solutions that are geared toward ending refugee status.

CHAPTER SIX

Permanent Residence and Naturalisation as Durable Solutions

1. INTRODUCTION

The preceding chapter has considered local integration as a form of durable solution to protracted refugee status in South Africa. It has established that South Africa has so far understood local integration narrowly as the formal guarantee of the rights of refugees. Without a clear policy to facilitate the realisation of the rights of refugees, refugees are expected to find their place in South African society on their own. Understood in this way, local integration does not end refugee status, does not ensure that refugees enjoy their rights in practice, and is therefore not a durable solution for the refugee in a protracted situation.

It is argued that only an end to refugee status can be considered a durable solution for a refugee in a protracted refugee situation. This chapter argues that while there are legal pathways to *ending* refugee status in South Africa by permanent residency and thereafter naturalisation, refugees encounter so many challenges when applying for a durable stay in South Africa that these pathways are effectively unavailable. The chapter analyses the complex legal basis (straddling three legislative Acts) upon which a refugee can apply for permanent residence and naturalisation or citizenship in South Africa.

2. THE BIFURCATED APPROACH TO ENDING REFUGEE STATUS

As noted above, there are two legal pathways to ending refugee status in South Africa. However, these pathways are bound up with a complicated process regulated by three different legislative Acts. Firstly, refugees are required to seek permission to apply for permanent residence in terms of the Refugees Act,⁷³¹ a process called ‘certification’.

⁷³¹ Refugees Act at section 27.

Thereafter, refugees may apply for permanent residence in terms of the Immigration Act.⁷³² Finally, refugees may apply for naturalisation in terms of the Citizenship Act.⁷³³ Each step is activated by an application and requires the previous step to be satisfactorily completed. These steps are discussed as a backdrop to a detailed discussion of the two pathways themselves.

2.1. Certification under the Refugees Act

Section 27 of the Refugees Act is pivotal to the refugees' well-being in South Africa. As shown in chapter five, this section confirms the rights that refugees have. More importantly for purposes of this thesis, section 27 also provides for permanent residence. It states:

A refugee is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991,⁷³⁴ after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee *indefinitely*. (emphasis added)

The positive feature about this provision is that it provides for a legal pathway to ending refugee status exists. However, this pathway is a qualified entitlement, allowing refugees to *apply* for an immigration permit. Refugees are, furthermore, asked to step outside of the Refugees Act, which is protection-orientated, and make the application in terms of the

⁷³² Act 13 of 2002.

⁷³³ Act 88 of 1995.

⁷³⁴ The Aliens Control Act has been replaced by the Immigration Act 13 of 2002.

Immigration Act, which is generally control-orientated.⁷³⁵ Refugees must also make this application to the Standing Committee of Refugee Affairs, which is an independent body created by the Refugees Act.⁷³⁶

Another problematic aspect of section 27(c) is that it only entitles the refugee to apply for an immigration status five years after formal recognition as a refugee and not from the time the refugee entered South Africa. Chapter five discussed the many difficulties faced by refugees in accessing asylum and highlighted the fact that many refugees live in South Africa for a very long time (in some cases up to 10 years) as temporary asylum seekers before they are officially recognised as refugees by the DHA.⁷³⁷ The eligibility for a durable immigration status after five years of continuous status as a recognised refugee is therefore in direct contradiction to the 2009 UNCHR Conclusion on Protracted Refugee Situations which takes into account the time of initial displacement.⁷³⁸

Most importantly, the entitlement to an immigration status is only activated if the Standing Committee certifies that the refugee will remain a refugee ‘indefinitely’. This certification process is the key to ending refugee status in South Africa. There is, however, limited direction for the Standing Committee and refugee applicants on how this application or adjudication is to be made. In particular, there are no guidelines on how *indefinite* refugee status is to be interpreted.

According to the Regulations made pursuant to section 38 of the Refugees Act (Refugee Regulations),⁷³⁹ certification does not only occur when an application for permanent residence is made. It can also occur in the normal course of the application and renewal of

⁷³⁵ Williams op cit note 447.

⁷³⁶ Refugees Act at section 9.

⁷³⁷ See the previous chapter for a detailed discussion hereof at section 5.3.

⁷³⁸ UNHCR 2009a op cit note 21, preamble.

⁷³⁹ GC 21075 GNR 366 of 6 April 2000.

refugee status.⁷⁴⁰ Refugees are granted asylum in terms of section 24 the Refugees Act and provided with documentation valid for a period of two years.⁷⁴¹ The refugee is directed to apply for renewal of the refugee status within 90 days before its expiry.⁷⁴² In terms of regulation 15(4), whenever a refugee applies for renewal of refugee status, the Standing Committee must consider whether he or she is subject to withdrawal of the refugee status, or whether he or she will remain a refugee indefinitely.

Regulation 15 (4) states:

1. If the Standing Committee determines that the individual will remain a refugee for the foreseeable future, the Standing Committee will certify that the individual will remain a refugee indefinitely, and the individual may apply for an immigration permit pursuant to section 27(c) of the Act.
2. If the Standing Committee determines that grounds for withdrawal of refugee status apply pursuant to section 36 of the Act, the Standing Committee will issue a notice of intent to withdraw refugee status pursuant to sub-regulation 17(2).
3. If the Standing Committee fails to find that the individual will remain a refugee in the foreseeable future and that no grounds for withdrawal of refugee status apply, the Refugee Status Determination Officer will renew the refugee identity document, valid for period of 2 years.

This regulation is of the utmost importance. It empowers the Standing Committee to declare that a person will remain a refugee indefinitely and to withdraw refugee status if the circumstances which gave rise to the need for protection no longer exist and no other

⁷⁴⁰ Regulation 15 (4).

⁷⁴¹ The practice has been for periods of four years for Somali residents since 2010.

⁷⁴² Regulation 15(d).

circumstances justify continued protection.⁷⁴³ The Standing Committee may then withdraw refugee status in terms of section 36 of the Refugees Act.⁷⁴⁴ However, if no grounds for withdrawal exist, even if the Standing Committee fails to find that the applicant will remain a refugee in the foreseeable future, the Refugee Status Determination Officer must renew the refugee status document for a further two years. This shows that refugee status is not permanent in nature: it may be withdrawn or converted into permanent residence.

Although regulation 15(4)(3) provides for the renewal of refugee status, it does not indicate how many times this may be done. This means that refugee status can be renewed indefinitely, creating the possibility for the emergence of a protracted refugee situation. This was clearly not the intention of the legislature, considering that the Refugee Act made specific provision for pathways to ending refugee status in South Africa.

2.2. The Standing Committee's Powers

As noted earlier, the body tasked with making the determination whether a refugee will remain a refugee 'indefinitely' is the Standing Committee.⁷⁴⁵ Additional functions of the

⁷⁴³ Section 5(1) (e) states; he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.

⁷⁴⁴ Section 36 Withdrawal of refugee status (1) If a person has been recognised as a refugee erroneously on an application which contains any materially incorrect or false information, or was so recognised due to fraud, forgery, a false or misleading representation of a material or substantial nature in relation to the application or if such person ceases to qualify for refugee status in terms of section 5 -

(a) the Standing Committee must inform such person of its intention of withdrawing his or her classification as refugee and the reasons therefore;

⁷⁴⁵ Refugees Act at section 9 (1).

Standing Committee are to assist the Status Determination Officers to interpret the law, review manifestly unfounded decision made by the Refugee Status Determination Officers, and withdraw refugee status once granted.⁷⁴⁶ The Standing Committee has discretion to decide whether the refugee has met the necessary requirements and is eligible to apply for permanent residence. It is, however, trite that no administrator has an unfettered discretion.⁷⁴⁷ There are a number of ways in which the exercise of discretion is limited. Administrators have a duty not to fetter their discretion, to gather information, evaluate the evidence, act reasonably and fairly without bias, observe the rules of procedural fairness, and provide reasons.⁷⁴⁸ In addition, administrators are bound by evidentiary rules, which if not adhered to, might render the decision unlawful or unfair. It is also important for the administrator to demonstrate an understanding of refugee law, such as the forward-looking test when determining refugee status,⁷⁴⁹ the applicable standard of proof when determining whether someone will remain a refugee, as well as the shared burden of proof when determining whether the change in the country of origin is a durable and lasting.⁷⁵⁰ A proper application of the principle of good faith⁷⁵¹ is required when implementing the relevant legislation for it to have to have the intended meaning.

⁷⁴⁶ Ibid at section 36.

⁷⁴⁷ See *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837.

⁷⁴⁸ Hoexter op cit note 639.

⁷⁴⁹ Ibid.

⁷⁵⁰ Hoexter op cit note 639.

⁷⁵¹ Ibid.

2.2.1. *Indefinite Refugee Status*

According to the Refugees Act, the refugee may apply for an immigration permit if the Standing Committee certifies that they 'will remain a refugee indefinitely'.⁷⁵² However, the application form for certification, which is formulated in accordance with the Regulations, states that the applicant must set out the reasons why he or she 'will not be able to return to his or her country in the foreseeable future'. Moreover, regulation 15(4) states that '[i]f the Standing Committee determines that the individual will remain a refugee for the foreseeable future, the Standing Committee will certify that the individual will remain a refugee indefinitely'. The Refugee Regulations suggests that the terms 'indefinite' and 'foreseeable future' are interchangeable.⁷⁵³

It is unclear whether proving indefinite refugee status means proving that the reasons that gave rise to refugee status are likely to subsist indefinitely or for the foreseeable future. By using the term 'foreseeable future', the Regulations appear to acknowledge that it is unlikely for a refugee to prove that the reasons that gave rise to the refugee status are likely to subsist indefinitely. It is trite in South African law that an Act of Parliament is superior to regulations. However, regulations that are consistent with their parent Act cannot be ignored without reasons. In the absence of specific guidelines, the Refugee Regulations must thus be interpreted in a manner that reflects the purpose of the Refugees Act; that is, they must be interpreted to ensure the protection – rather than the control – of refugees.⁷⁵⁴ In light of the

⁷⁵² The Application Form is known as the BI-1754.

⁷⁵³ Oxford English Dictionary (2010) Oxford University Press confirms that indefinitely could be defined as 'endlessly, continually, forever, ad infinitum', whereas 'foreseeable future' means that part of the future that can be envisioned whilst the current circumstances remain intact.

⁷⁵⁴ 1997 Green Paper op cit note 440.

fact that there are no guidelines for the Standing Committee to make this determination, the well-known principles of statutory interpretation could be used. The starting point for statutory interpretation is that an administrator must interpret the word in its ordinary meaning as long as it does not contradict the clear intention of the legislature. Further presumptions caution against adopting an interpretation that renders an Act superfluous, futile, or nugatory or an interpretation that is ‘harsh, unjust and unreasonable’.⁷⁵⁵

If a refugee is expected to make his or her case based on the circumstances in the country of origin, this could mean proving that the current government will remain in power indefinitely; where the civil war has ended, that it will not flare up again; or where there is peace, that the peace will not last. All of these claims are difficult to prove. Proving the risk of harm faced by the refugee – whether from the State or non-State actors – is also difficult. These are, thus, particularly harsh and unreasonable requirements that the applicant is expected to meet.

These harsh requirements could render certification impossible and section 27 of the Act superfluous. It must be presumed that the Act was enacted to ensure that the certification process was fair, accessible and just and to facilitate access by refugees to a suitable immigration permit.

2.2.2. Predicting a Lasting and Durable Change in the Country of Origin

The Standing Committee is obliged to determine whether it will be safe for the refugee to return to their country of origin before granting certification. This determination raises various issues. Whether the Standing Committee opts to apply the term ‘indefinitely’ when making the determination to grant certification, or whether it considers the phrase

⁷⁵⁵ Botha op cit note 62 at 67.

‘foreseeable future’, as found in the Regulations, the Standing Committee will have to make a prediction into the future. It will have to predict that conditions have improved or will improve to the extent that refugees will be safe upon return. The Standing Committee will essentially be making a forward-looking assessment of the risk, thus conjecturing into the future. Both these issues – whether change is lasting and durable and whether it is fair to speculate and thus apply a forward-looking test – have been commented upon by the UNHCR,⁷⁵⁶ refugee law scholars⁷⁵⁷ and the courts.⁷⁵⁸

A guide on the prediction of lasting and durable change can be drawn from the UNHCR’s experience with cessation.⁷⁵⁹ The UNHCR will only invoke cessation if the peace in the country of origin is durable and lasting. There are three requirements for the invocation of the ceased circumstances clause or cessation clause.⁷⁶⁰ The first is that there must be lasting peace. The second is that the peace must be enduring. The third is that the peace must result in the eradication of a well-founded fear of persecution as well as the restoration of protection.⁷⁶¹ To crystallise the cessation clause, fundamental change in the country of origin must be of such a ‘profound and enduring nature that refugees from that country no longer require protection from a foreign country’.⁷⁶² Fundamental change refers to complete political

⁷⁵⁶ Khan & Schreier op cit note 7 at 41.

⁷⁵⁷ Goodwin-Gill op cit note 284.

⁷⁵⁸ *INS v Cordoza-Fonseca* 480 US 421 (1987) 453; *Van Garderen NO v Refugee Appeal Board* Case No 30720/2006, 19 June 2007 (unreported); *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T).

⁷⁵⁹ UN Refugee Convention at Article 1C.

⁷⁶⁰ UNHCR The Cessation Clauses: Guidelines on Their Application, 26 April 1999 (hereinafter “UNHCR Guidelines”), available at <http://www.refworld.org/docid/3c06138c4.html>, accessed 2 February 2013 at paras. 10-16.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

change. Depending on the grounds for flight, significant reforms such as elections, declarations of amnesties and the repeal of oppressive laws may serve as evidence of fundamental change.⁷⁶³ Most importantly, the home government must be able to demonstrate that it can take care of its citizens and that it can guarantee their safety. Evidence of movement in a peaceful or rights-based direction is not sufficient: the basic reforms must be in place.⁷⁶⁴ No all political reforms warrant cessation unless they are causally connected to the risk upon which refugee status was recognised.⁷⁶⁵

It is also important that fundamental change is tested against the individual applicant's personal circumstances. The Canadian case of *Arguello v Canada*⁷⁶⁶ held that 'when one says change in circumstances is an important consideration, one is not speaking of any change. The decision-maker must not be content in simply noting that changes have taken place, but must assess the impact of those changes on the person concerned.' The durability of the reform must be tested and the duration over which the reform is tested will inevitably be longer where the country has just emerged from conflict. Furthermore, Hathaway asserts that 'formal evidence of change' must be tested against the reality on the ground.⁷⁶⁷

⁷⁶³ Ibid.

⁷⁶⁴ See UK House of Lords *Hoxha* judgement/ *R v Secretary of State for the Home Department, Ex parte Hoxha*, [2002] EWCA Civ (CA 2002) (as well as Canadian case of *Nkosi v Canada* which made a 'hesitant and equivocal finding that certain limited changes in circumstances in Zaire occurred' refugee status granted).

⁷⁶⁵ UNHCR ceased circumstances guidelines at para. 10 'fundamental changes are considered effective only if they remove the basis of the fear of persecution; therefore, such changes must be assessed in light of the particular cause of the fear, so as to ensure that that the situation which warranted the grant of refugee status has ceased to exist.

⁷⁶⁶ *Arguello-Garcia v Canada (Minister of Employment and Immigration)* (1993) 21 Immigration Law Reports (2d) 285 (FCTD).

⁷⁶⁷ Ibid.

The supposed reform in the country of origin must be linked to the core concern of the refugee definition: can refugees avail themselves to the protection of their home State? Such protection must be effective and viable, having regard to the general human rights situation in the country of origin.⁷⁶⁸

2.2.3. Applying the Forward Looking Test

Many countries, including the United States and Canada, do not only employ the forward-looking test when refugees apply for refugee status or when they apply for permanent residence. They simply consider the situation at the time of application. The speculative test is not considered realistic and the discretion afforded to administrators in such cases is considered to be too wide to ensure fairness and justice.⁷⁶⁹ Even though South Africa has provided for past persecution in its Refugees Act,⁷⁷⁰ the forward-looking test is generally employed for refugee status determination in South Africa.⁷⁷¹ This test has somehow been introduced at the certification stage, which essentially means that the Standing Committee is expected to conduct an investigation into the future.⁷⁷² The manner in which refugee law has

⁷⁶⁸ Hathaway op cit note 36 at 927.

⁷⁶⁹ See US Immigration Regulations, 8 CFR. § 208.13(b)(1)(iii)(a) (2005); Immigration and Refugee Protection Act, chapter 27, SC 2001, § 108(4) (Can.).

⁷⁷⁰ Ibid at section 5(1) e.

⁷⁷¹ *Van Garderen NO v Refugee Appeal Board* and *Fang v Refugee Appeal Board and Others* 2007 (2) SA 447 (T).

⁷⁷² G Goodwin-Gill *The Refugee in International Law* (2007) 3 ed Oxford University Press: Oxford.

dealt with the speculative test is by reconsidering the accepted standard of proof on a ‘balance of probabilities’ which is generally used in ordinary civil proceedings.⁷⁷³

The standard of proof for establishing refugee status has been set lower than on a balance of probabilities. It is internationally accepted that the standard of proof is on reasonable possibility, but that even this standard is too onerous for refugees.⁷⁷⁴ As Goodwin-Gill has argued: ‘... a decision on the well-foundedness of the fear is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the near future, if he returned to his country of origin. Particular care, therefore, needs to be exercised in applying the correct standard of proof’.⁷⁷⁵ As further explained by Goodwin-Gill, in civil cases, the typical issue is whether a legally close relevant relation exists between past causes and past effects. The applicant for refugee status is adducing a future speculative risk as the basis for a claim to protection, a degree of lesser likelihood than that of a balance of probabilities is required.⁷⁷⁶ South Africa has accepted this lesser standard of proof in determining whether it is safe for a refugee to return home.⁷⁷⁷ Expecting the refugee to

⁷⁷³ Goodwin-Gill *ibid*; UNHCR Note on Standard and Burden of Proof, 16 December 1998, available at <http://www.refworld.org/docid/3ae6b3338.html>, accessed on 5 May 2016. Already in 1987 the United States Supreme Court in *INS v Cordoza –Fonseca* *supra* note 759 rejected the traditional balance of probabilities standard in favour of a more generous reasonable possibility test. The Court held that: ‘There is simply no room in the United States definition for concluding that because an applicant has a ten percent (10%) chance of being shot, tortured, or otherwise persecuted, that he or she has no well-founded fear’ of the event happening ... [A] moderate interpretation of the well-founded fear standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.’

⁷⁷⁴ UNHCR *ibid*.

⁷⁷⁵ Goodwin-Gill *op cit* note 773.

⁷⁷⁶ Goodwin-Gill *op cit* note 773.

⁷⁷⁷ *Van Garderen & Fang* *supra* note 759.

establish whether he will remain a refugee indefinitely similarly demands that the refugee speculates into the future, not just into the foreseeable future according to the Standing Committee. Hence it is submitted that a lesser standard of proof should be the applicable standard.

Even though the burden of proof in a civil matter is generally on the applicant, refugee law has recognised the prejudice to vulnerable refugees and that this burden should be shared between examiner and refugee.⁷⁷⁸ While decision-makers are allowed to conduct their own investigations to assist them with discharging their evidential burden,⁷⁷⁹ the information gathered must be shared with the affected refugees. It is trite in administrative law that when an administrator uses information not considered by the applicant, the applicant must be given an opportunity to respond to it.⁷⁸⁰ In *AOL v Minister of Home Affairs*,⁷⁸¹ the Court considered the question whether the Refugee Appeal Board was obliged to bring to the attention of the appellant prejudicial information and afford them an opportunity to deal with this information before making a formal decision. Referred to *Kotze v Minister of Health*,⁷⁸² the Court came to the conclusion that the applicant was denied a fair hearing, arguing that ‘the applicant should have been granted the opportunity to deal with the information, which did not form part of his application, and which was later taken into account’.⁷⁸³ This decision is consistent with section 6 of the Promotion of Administrative Justice Act (PAJA), which

⁷⁷⁸ UNHCR Handbook at para 196.

⁷⁷⁹ UNHCR Handbook at para 196.

⁷⁸⁰ *Kotze v Minister of Health* 1996 (3) BCLR 417 (T).

⁷⁸¹ *AOL v Minister of Home Affairs* 2006 (2) SA 8 (D).

⁷⁸² *Kotze* supra note 781.

⁷⁸³ *AOL* supra note 782 at 13.

provide any person adversely affected by administrative action has the right to know what evidence is being relied upon to reach a decision against him or her.⁷⁸⁴

Yet, it is the practice of the Standing Committee to use reports on conditions in countries without giving the applicants an opportunity to respond. Information must be shared and the applicant must be given an opportunity to respond to it or adduce his or her own information to contradict it.⁷⁸⁵

From the above discussion, it is apparent that a harsh or literal interpretation of the legislative provision that entitles a refugee to apply for a durable immigration permit can effectively block the refugees' path thereto resulting in a protracted refugee situation. The case brought by Somalis discussed below highlights some of these difficulties.

2.3. The Somali Case as Evidence of Problems with Certification

*The Somali Association of South Africa and Others v the Chairperson of the Standing Committee for Refugee Affairs*⁷⁸⁶ highlights the difficulties refugees face in accessing permanent residence, even though there is a clear legal pathway to ending refugee status in the Refugees Act. This case deals with refugees who have made applications for certification. Although judgement is yet to be delivered, the founding documents of this case reveal the Standing Committee's approach to certification.

As stated earlier in this thesis,⁷⁸⁷ Somali nationals have sought refuge in South Africa since the early 1990s. Consequently, a large number of Somalis have been in South Africa for

⁷⁸⁴ See Promotion of Administrative Justice Act 3 of 2000.

⁷⁸⁵ See case study at section 6 of this chapter.

⁷⁸⁶ High Court, Western Cape Division, Cape Town, Case No 18655/14 (ongoing).

⁷⁸⁷ See chapter one, section 2.

five years or longer; they have also not been able to return to Somalia because of the persistence of conflict there.⁷⁸⁸ Many of them have remained here as refugees. It could therefore be said that they are in a protracted refugee situation as defined in the UNHCR Conclusions on Protracted Refugee Situations.⁷⁸⁹ They cannot return to Somalia and South Africa has refused them a more durable form of residence than refugee status. At the same time, the resettlement efforts by the UNHCR only serve a very small number of refugees in South Africa.⁷⁹⁰

According to its *founding affidavit*, about 35 Somali refugees made their applications for certification between October 2010 and June 2012. They all received feedback in 2014, stating that their applications had been rejected because they were unable to prove that they would remain refugees indefinitely due to changed circumstances in Somalia.

In addition to these 35 Somali refugees, a further 132 Somali refugees have also had their certification applications rejected on exactly the same basis. Both groups approached the UCT Refugee Law Clinic for legal assistance. Similar experiences by Somalis have been reported at the Nelson Mandela Metropolitan University Law Clinic,⁷⁹¹ the Legal Resources Centre,⁷⁹² the Wits Law Clinic and Lawyers for Human Rights.⁷⁹³

The response to the applicants' case shows that the Standing Committee has adopted a literal approach to the interpretation of the provision that refugees must prove that they will remain refugees indefinitely before certification can be granted for purposes of permanent

⁷⁸⁸ See chapter one.

⁷⁸⁹ See chapter two of this thesis at 2009 UNHCR Protracted refugee situation Conclusion.

⁷⁹⁰ This has been confirmed by UNHCR South Africa office. Also the recent Trump executive order has banned refugees from Somalia entering the U.S.

⁷⁹¹ NMMU Law Clinic, available at <http://cla.nmmu.ac.za>.

⁷⁹² Legal Resources Centre, available at <http://lrc.org.za/lrcarchive/>.

⁷⁹³ Lawyers for Human Rights, available at <http://www.lhr.org.za/>.

residence.⁷⁹⁴ In its answering affidavit, the Standing Committee maintains that the literal meaning of the word ‘indefinitely’ must be used. In support of its stand, it makes reference to a rule of statutory interpretation,⁷⁹⁵ which states that:

... in the first instance you take what the word means in the popular sense and ordinary parlance, words use in an enactment should be understood in their everyday meaning unless that word is in conflict with the intention of the law giver as it appears from the statute read as a whole and from other material circumstance.

The Standing Committee also used as authority for its approach the case of *Vansa v Vanadium SA Ltd v Registrar of Deeds*,⁷⁹⁶ which interpreted the word ‘indefinite’ as meaning without ‘limitation as to time’. The Committee adopted this meaning without considering the context in which the word was used and interpreted in that case. A further authority used by the Standing Committee is *Treadwell and Another v Roberts*,⁷⁹⁷ where the Court considered the meaning of the expression ‘for an indefinite period’ and held that ‘indefinite’ in itself means ‘not defined’. The Standing Committee also made reference to the dictionary meaning of ‘indefinitely’. Using these sources, the Standing Committee came to the conclusion that all of the applicants were unable to prove that they would remain refugees indefinitely and therefore refused to grant them certification, effectively blocking their permanent residence applications.

⁷⁹⁴ Answering Affidavit at paras 15-18.

⁷⁹⁵ E A Kellway *Principle of Legal Interpretation, Statutes, Contracts and Wills* (1995) Butterworths: Oxford at 69.

⁷⁹⁶ (1996) 1 All SA 433 (T).

⁷⁹⁷ 1913 WLD 54.

As has been argued above, it is impossible for anyone to prove that they will remain a refugee indefinitely. The literal approach adopted by the Standing Committee has had the effect of making permanent residence unavailable to refugees.⁷⁹⁸ Also noteworthy is the fact that this interpretation is inconsistent with the term ‘foreseeable future’ used in the Regulations and on the application form for certification, which very clearly states that the applicant must set out the reasons why he or she ‘will not be able to return to his or her country in the foreseeable future’.

It is also clear from the letters of rejection that the Standing Committee came to the conclusion that the applicants would not remain refugees by looking at the conditions in the country of origin only. The Standing Committee also justified its decision rejecting the certifications by saying that significant change had occurred in Somalia indicating that the current conflict was reaching an end.⁷⁹⁹ Arguing that certification was inherently a forward-looking process, it said that the conditions of the country of origin had to be taken into account.⁸⁰⁰ The Committee made this decision partly because refugees cannot prove that they will remain refugees indefinitely.

Furthermore, the Committee appears to have relied on evidence that supported its view that conditions had changed so much in Somalia that it was safe for refugees to return home. There is no indication that the Standing Committee considered the information supplied by the applicants that showed violence in Somalia had continued to occur and it was likely to continue into the foreseeable future. The Standing Committee also only considered

⁷⁹⁸ See Botha *op cit* note 373 for the full discussion on the application of statutory interpretation principles.

⁷⁹⁹ Answering Affidavit at paras 50-59.

⁸⁰⁰ Answering Affidavit at para 17.

information about improvements in Somalia at the national level and ignored the specific areas where the refugees fled from.⁸⁰¹

Even though they were not granted certification, the Standing Committee nevertheless instructed the Refugee Status Determination Officers to renew their status as refugees for a further four years. None of the rejected applicants had their status withdrawn by the Standing Committee. In fact, since their application for certification, some applicants have had their status renewed and, consequently, their refugee status will only expire in 2020. We thus have the extraordinary situation where some Somali refugees have lived in South Africa as refugees for more than 20 years with seemingly no end in sight to their refugeehood. The renewal of their refugee status is precisely the action that results in a protracted refugee situation.

In this case, even though the Standing Committee rejected the applicant's contention that they would remain refugees indefinitely, it appears that they accepted the applicants' contention that they would remain refugees in the foreseeable future. It is curious that since the determination that the situation in Somalia had improved was made, the government has made no effort to repatriate Somali refugees. Instead, the government has continued to renew their refugee status. If it continues to renew their status without providing them with the opportunity to apply for permanent residence, the Standing Committee can be criticised of applying the law in bad faith.

3. PERMANENT RESIDENCE AS A DURABLE SOLUTION

This thesis has demonstrated the extent to which living with refugee status in South Africa is an insecure way of life. This insecurity, it has been established, stems largely from the type of

⁸⁰¹ Answering Affidavit at paras 50 – 59.

short-term documentation that refugees are issued. Far too many services are withheld for the refugee because of their status. Refugees struggle to enjoy the rights guaranteed to them by the Constitution and the Refugees Act: they may work and study, but they cannot be registered in the legal, medical, educational industries or professions.⁸⁰² They struggle to open bank accounts,⁸⁰³ access pension funds, get home loans, get a driver's licence, and to find jobs, because refugee status documents are issued for short periods of time.⁸⁰⁴ Permanent residence, on the other hand, provides a more secure legal status.

Apart from guaranteeing secure legal status, permanent residence allows refugees to become part of a national community. Refugees may want to retain their nationality for various reasons, but this does not mean that they do not want to be part of a world community. Permanent residence gives refugees that sense of belonging craved by refugees in protracted situations. For refugees who do not want to change their nationality, permanent residence is a good middle ground solution.

The Courts too have identified permanent residents as a class of foreigners with more rights than refugees.⁸⁰⁵ Furthermore, in contrast to local integration, which in reality can mean indefinite refugee status, permanent residence signifies an end to refugee status. In South Africa, permanent residence is made available to refugees through its Immigration Act,⁸⁰⁶ but as explained above, the application straddles both the Refugees Act, where

⁸⁰² A Bhamjee & J Klaaren 'Legal Problems Facing Refugees in Johannesburg' in Landau (ed) *Forced Migrants in the New Johannesburg: Towards a Local Government Response* (2004) Johannesburg: Forced Migration Studies Programme, 54–60.

⁸⁰³ See section 5.4 of chapter five.

⁸⁰⁴ Ibid.

⁸⁰⁵ *Khosa* supra note 571; *Union of Refugee Women* supra note 584, discussed in chapter five.

⁸⁰⁶ Immigration Act.

prescribed requirements must be met (the cumbersome certification process as discussed above) before the completion of the application in terms of the Immigration Act.

3.1. Definition and Legal Basis

Permanent residency refers to a person's visa status. The person is allowed to reside indefinitely within a country of which he or she is *not* a citizen. Most importantly, permanent residence allows a foreigner to reside permanently in a host country without giving up his or her nationality. This secure legal status allows for greater integration into the host community than local integration. According to section 25(1) of the Immigration Act, a holder of a permanent residence permit 'has all the rights, privileges, duties and obligations of a citizen save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship'.⁸⁰⁷

Permanent residence is distinct from citizenship, but it is also distinct from refugee status. This difference is evident in South Africa because permanent residence is a legal residency status that a refugee can apply for, five years after being granted refugee status.⁸⁰⁸ By comparison, in the United States, refugees may apply for permanent residency after one year of admission to refugee status.⁸⁰⁹ Unlike in South Africa, it is compulsory in the United

⁸⁰⁷ Ibid.

⁸⁰⁸ See explanation of section 27 of the Immigration Act below.

⁸⁰⁹ M Gebremeskel 'Applying for Permanent Residence as a Refugee', available at <http://www.nolo.com/legal-encyclopedia/applying-permanent-residence-refugee.html>, accessed on 23 February 2017; See Also US Department of Homeland Security at <https://www.uscis.gov/green-card/green-card-through-refugee-or-asylee-status> accessed on 5 September 2016

States for refugees to apply for permanent residence after the one year. This rule guarantees an end to refugee status.⁸¹⁰

Under the South African Immigration Act, a refugee can make an application for permanent residence in terms of section 27 as opposed to section 26 of the Immigration Act.⁸¹¹ Section 27(d) provides that ‘The director-general may issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the Refugees Act subject to any prescribed requirements’.

Unlike in the United States, neither the Immigration Act nor the Refugees Act compels the refugee to make this application for permanent residence, even after the required lapse of five years since the grant of refugee status. The DHA is also not required to inform refugees of the availability of permanent residence as an option to end their refugee status. Refugees may thus be unaware of this right and continue to live with refugee status in perpetuity in South Africa.

⁸¹⁰ Ibid.

⁸¹¹ Section 26 of the Immigration Act - Direct residence

Subject to section 25, the Director-General may issue a permanent residence permit to a foreigner who—

- (a) has been the holder of a work permit, including one issued under a corporate permit, in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment;
- (b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permit shall lapse if at any time within two years from the issuing of that permit the good faith spousal relationship no longer subsists, save for the case of death;
- (c) is a child under the age of 21 of a citizen or permanent resident, provided that such permit shall lapse if such foreigner does not submit an application for its confirmation within two years of his or her having turned 21 years of age; or
- (d) is a child of a citizen.

According to regulation 24(11) of the Immigration Regulations,⁸¹² the requirements contemplated in section 27(d) of the Act are:

(a) the submission of the certification contemplated in section 27(c) of the Refugees Act, 1998 (Act No. 130 of 1998);

(b) where applicable, the submission of affidavits with regard to aliases used by the applicant and family members; and

(c) the submission of the documentation contemplated in regulation 22(3)(b), (f), (g), (h) and (i):
Provided that in the case of documents issued by the country from which he or she fled not being available, a sworn affidavit shall be submitted.

All refugee applicants for permanent residence must therefore satisfy the DHA that they have been granted certification by the Standing Committee on the basis that they will remain refugees indefinitely and that they have been continuously present in South Africa for a period of five years after being granted refugee status. In addition, the applicants must submit their own birth certificates and those of their dependents, proof of spousal relationships, medical and radiological reports, and police clearance certificates.

It may not always be possible for refugees to provide all these documents because of the manner in which they are forced to flee and because their refugee status makes it difficult for them to approach their governments for such documents. Understandably, the Regulations require an affidavit in place of the prescribed documents where the documents cannot be obtained.

Generally, permanent residence applicants have to demonstrate that they are of good character and a police clearance certificate issued by their own government is taken as evidence of this. The certificate normally asserts that the bearer has not been convicted of any

⁸¹² Immigration Act 13 of 2002, Immigration Regulations 2014.

criminal offence or engaged any undesirable behaviour. An exception has been made for refugees who cannot be expected to approach their governments for such a reference of good character. Refugees must instead source such confirmation of good character from the South African police, who will only issue such a certificate if there is no criminal record in South Africa.⁸¹³

While this exception is welcome, it has been found to be particularly prejudicial to asylum seekers and refugees who have been forced to admit guilt and pay administrative fines for expired permits.⁸¹⁴ Permits expire most often because asylum seekers and refugees are unable to access the Refugee Reception Offices due to maladministration at these offices or due to lack of funds to travel to offices, located far away from their place of residence, four to five times a year in the case of asylum seekers.⁸¹⁵ These technical difficulties in accessing the Refugee Reception Offices have criminalised refugees and compromised their good character.

Another major obstacle for permanent residence applications appears to be the waiting periods, which is no less than two years. This problem is not unique to refugees who apply for permanent residence: it applies to all permanent resident applicants.⁸¹⁶ In *Eisenberg*,⁸¹⁷ the Western Cape High Court held that waiting for 19 months for a visa and permit to be finalised is unlawful, unjust and procedurally unfair. Applicants have a right to have their applications finalised speedily. Furthermore, even though refugees have also been exempted

⁸¹³ See https://www.saps.gov.za/services/applying_clearance_certificate.php, accessed on 17 February 2017.

⁸¹⁴ *Bukasa v Minister of Home Affairs* Case No 22197/10, Western Cape High Court (unreported).

⁸¹⁵ See chapter five.

⁸¹⁶ *Eisenberg and Others v Director-General Home Affairs and Others* 2012 (3) SA 508 (WCC).

⁸¹⁷ *Ibid.*

from paying the fees for the application; they still have to pay the private company (VFS – Global) an enormous administrative fee for handling the application.⁸¹⁸

From this discussion, it can be concluded that South Africa considered the particular position of refugees and made an effort to lower the requirements for an application permanent residency by refugees, such as reducing fees for application, and obtaining a police clearance in South Africa, rather than from the country of origin. It is submitted, however, that South Africa did not sufficiently consider the vulnerabilities of refugees when legislating for the requirements for applications for permanent residency by refugees.

Whilst on the face of it appears that South Africa has made it easier for refugees to apply for residency, as directed by Article 34 of the UN Refugee Convention, South Africa has made it more cumbersome by expecting refugees to meet additional requirements to those other foreigners have to meet. For example, the refugee has to undergo the burdensome certification process while other foreigners do not have to. Furthermore, while other foreigners can make their applications for permanent residence on the basis of their permanent employment in South Africa, this option is not available to refugees. As has already been pointed out, the fact that refugee documents are valid for a short period of time operates as a hindrance for refugees to find permanent employment which would enable them to apply for permanent residence. Furthermore, information about their personal circumstances in South Africa, such as their contribution, or loyalty, to South Africa or their self-sufficient status is not considered at the certification stage. Overall, the system does not favour the application of refugees for permanent residence: refugees must first overcome the hurdle of proving that they will remain a refugee indefinitely and, once they have overcome

⁸¹⁸ VFS Fees at a glance, available at www.vfsglobal.com/zsp/southafrica/visa_fees_at_glance.html accessed on 8 September 2016.

that hurdle, they have to fulfill the eligibility and procedural requirements of the permanent residency.

3.2. Permanent Residence as a Solution to Refugeehood

Even though permanent residence is not expressly addressed by the UN Refugee Convention, many countries have included it directly in their refugee legislation and have made it available to refugees after varying periods of time.⁸¹⁹ According to Hathaway, traditionally countries of the North have regularly converted refugee status into permanent residence even though this is technically not required by the UN Refugee Convention. Countries of the North provide permanent residence automatically because of the ‘interest convergence’, but this is changing in recent times as some of these countries have introduced temporary protection as an alternative to refugee protection under the UN Refugee Convention.⁸²⁰ Hathaway is a proponent of temporary protection; he does not believe permanent residence should automatically extend to refugees.⁸²¹ He has, however, identified particularly vulnerable refugees such as unaccompanied minors and tortured victims who should be granted immediate permanent residence.⁸²² He has also identified five years as a reasonable time after which refugees should be considered for permanent residence if they are unable to return to

⁸¹⁹ J Hathaway & R A Neve ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* at 115 – 119 (Even though international law presently requires no more than the provision of rights-regarding temporary protection, Northern states, in law or in practice, have historically afforded refugees permanent status).

⁸²⁰ Ibid.

⁸²¹ Ibid.

⁸²² C Eyber & J Hathaway ‘Refugee Protection in South Africa: A Conversation’, available at www.queensu.ca/samp/sampresources/migrationdocuments/interviews/inter1.htm, accessed 23 December 2016.

their country of origin.⁸²³ This solution-orientated approach can assist in stemming the ever-growing protracted refugee situation in South Africa.

Permanent residence is a legal status that is distinct from refugee status, but it is also distinct from naturalisation or citizenship. In South Africa, it is a prerequisite for naturalisation in South Africa. A number of other countries have adopted the bifurcated approach to naturalisation.⁸²⁴ Many countries have demonstrated reluctance to immediately allow for naturalisation and have introduced the secure legal status of permanent residence; it can, therefore, be seen as a viable alternative to naturalisation.

Permanent residence, in many ways, is the best solution for refugees in protracted situations. Refugees can become part of a national community, enjoy a range of rights that will allow them to live in dignity, and have secure legal status. For various reasons refugees may simultaneously want to retain their nationality and to be part of the world community, being allowed freedom to move not only internally but also across borders. Permanent residence gives refugees that sense of belonging craved by refugees in protracted situations.

4. NATURALISATION AS A DURABLE SOLUTION

4.1. Introduction

Once a refugee has been afforded permanent residence in South Africa, they can apply for naturalisation. As was shown in chapter three, naturalisation is regarded by Article 34 of UN Refugee Convention as a durable solution to protracted refugee situations. In addition, South

⁸²³ Ibid.

⁸²⁴ Hathaway & Neve op cit note 820 at 837.

Africa has ratified the OAU Refugee Convention, whose Article II.1⁸²⁵ states that States should use their best endeavours to 'secure the settlement' of refugees who are unable to return home.

South Africa's post-Apartheid refugee policy clearly envisaged the naturalisation of refugees.⁸²⁶ The 1998 White Paper stated:

While reiterating that voluntary repatriation is the best solution for refugee problems, the task team are mindful that there are refugees for whom going home may not be a viable solution in the foreseeable future. Therefore, a refugee, having been recognised as a refugee and granted asylum may, after a period of five years, make an application for naturalisation. In making such an application the same criteria will apply to refugees as to permanent residents.⁸²⁷

As noted in chapter four, the White Paper did not adopt a bifurcated approach consisting of permanent residence as the first step, and naturalisation as the second step. Even the draft 1998 Refugees Bill⁸²⁸ explicitly provided for naturalisation, without requiring that the refugee apply for permanent residence first. It was the Refugees Act that introduced the bifurcated approach. As argued earlier, this approach is severely cumbersome.

It is clear from various studies that refugees want some kind of stability in legal status and that they do not want to be treated as second-class persons in perpetuity. In some countries,

⁸²⁵ Article II.1 provides: 'Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.'

⁸²⁶ The Draft Refugees White Paper incorporating the Draft Refugees Bill (1998) Government Gazette Vol 396 18 June 1998 No 18988, available at http://www.gov.za/sites/www.gov.za/files/18988_0.pdf, accessed on 21 September 2016.

⁸²⁷ Ibid.

⁸²⁸ 1998 Bill op cit note 827 at section 26.

naturalisation is the only means by which this can happen. In others, like South Africa, refugees can apply for permanent residence status as well.

4.2. The Meaning of Naturalisation

Naturalisation has a distinct legal meaning. In *Nottebohm*, the International Court of Justice (ICJ) said: ‘According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.’⁸²⁹

The terms ‘nationality’ and ‘citizenship’ are used interchangeably today,⁸³⁰ but not during Apartheid. According to Manby:

In African countries under colonial rule or South Africa under apartheid, only those of European descent had both nationality and full citizenship rights. Similarly, it used to be common for women to have nationality of a state but not full citizenship, because they did not have the right to vote. Today, human rights law principles of non-discrimination require that all those who are nationals of a state enjoy the same rights.⁸³¹

No doubt citizenship symbolises the strongest bond between the State and the holder.⁸³²

Nationality provides the holder with rights, such as the right to diplomatic protection when

⁸²⁹ Op cit note 364.

⁸³⁰ The terms are used interchangeably in this thesis.

⁸³¹ B Manby *Citizenship laws in Africa, A Comparative Study* (2016) 3 ed Open Society Foundations: New York at ix in note 3.

⁸³² Ibid 832.

outside the country, the right to hold political office and vote. These rights are normally not available to non-citizens.

4.3. Legal Basis and Process for Naturalisation for Refugees

Naturalisation is a possibility after five years of continuous residence as a permanent resident.⁸³³ This means that a refugee who obtains permanent residence and lives in South Africa continuously for the duration of at least five years can apply for naturalisation. There is thus a legal pathway to naturalisation for refugees in South Africa by means of the immigration and citizenship laws. Although these provisions give expression to Article 34 of the UN Refugee Convention, many challenges make it difficult for refugees to obtain naturalisation.

Refugees may acquire nationality in South Africa, but only upon application. Furthermore, consideration of the application is discretionary as the responsible Minister may reject it if he or she feels that the applicant is not of good moral character, does not speak any official South African language well enough, or other reasons.⁸³⁴ South African citizenship policy thus appears to be assimilationist in nature.

Section 5(a) of the Citizenship Amendment Act 17 of 2010⁸³⁵ provides:

The minister may, upon application in the prescribed manner, grant a certificate of naturalization as a South Africa citizen to any foreigner who satisfies the Minister that;

(b) he or she has been admitted to the Republic for permanent residence therein; and

⁸³³ Section 5 of the Citizenship Act 88 of 1995.

⁸³⁴ Citizenship Act.

⁸³⁵ South African Citizenship Amendment Act 17 of 2010.

(c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application and that he or she has, in addition, been resident in the Republic for a further period of not less than four years during the eight years immediately preceding the date of his or her application.

These provisions mean that a refugee is eligible for naturalisation in South Africa if he or she has been physically and continuously present in South Africa for no less than 10 years. This means that the minimum period of qualification for naturalisation exceeds that stipulated by the UNHCR for refugees in protracted situations by more than double.⁸³⁶

South Africa makes no distinction between refugees and other foreigners as far as the application for naturalisation is concerned, although the UN Refugee Convention expects it to do so.⁸³⁷ The Council of Europe Explanatory report⁸³⁸ contains some examples of favourable conditions, which include a length of required residence, less stringent language requirements, a simpler procedure, and the lowering of fees. Some European Union States have translated the spirit of these provisions into their national laws by reducing waiting periods and fees or removing the requirements for the renunciation of the citizenship of the host country. A further good practice among European States is that the period spent as an asylum seeker is taken into consideration when calculating the waiting period required for refugees to submit an application for citizenship.

By contrast, section 5 suggests that the period between entry into South Africa and obtaining refugee status is not taken into account. This is inconsistent with the duty that

⁸³⁶ See chapter two.

⁸³⁷ UN Refugee Convention at Article 34 requests for the process to be expedited and for, amongst others, the fees to be lowered.

⁸³⁸ Council of Europe Explanatory Report Strasbourg 16 X 1980.

South Africa has in international law to assist refugees to meet the requirements for naturalisation.⁸³⁹

Citizenship and permanent residency require refugees to give up their refugee status. This is so because in South Africa, no immigrant can hold more than one legal status.⁸⁴⁰ However, by the time refugees apply for naturalisation, they are no longer considered to be refugees but permanent residents. It may therefore be asked whether refugees who have been granted permanent residence need or want this additional guarantee of naturalisation. It cannot be disputed that permanent residence ends refugee status and hence can be used to avert protracted refugee situations. Refugees clearly have a choice. Once they acquire permanent residence, they are not compelled to apply for naturalisation. However, there is a strong possibility that those with permanent residence may become stateless. Naturalisation is an appropriate solution for these. For example, refugee children born in South Africa may be denied the nationality of their parents. Naturalisation is therefore strongly recommended in cases where refugees or permanent residents are in danger of becoming stateless.

4.4. Refugee Children Born in South Africa

Children of refugees born in South Africa are arguably the worst affected by their refugee status. South Africa does not grant citizenship based on birth.⁸⁴¹ *Jus soli*, which describes a system of law that grants nationality on the basis of birth on the territory, does not apply in South Africa. Thus, any refugee child born in South Africa does not automatically become a

⁸³⁹ See chapter three, section 5.

⁸⁴⁰ Immigration Act.

⁸⁴¹ R Elphick 'A State of Statelessness', available at <http://www.lhr.org.za/news/2015/state-statelessness>, accessed on 2 March 2017.

citizen, but is simply the child of a recognised refugee or permanent resident. Citizenship by status or blood, also known as *jus sanguinis*, which South Africa recognizes, is highly prejudicial for refugee children born in South Africa. These children start their life and continue to live in inequality until they attain the age of 18 years and prove continuous residence in South Africa.

Section 4 of the 2010 Citizenship Amendment Act⁸⁴² provides:

(1) Any person who –

(a) Immediately prior to the date of the commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by naturalisation; or

(b) In terms of this Act is granted a certificate of naturalisation as a South African citizen in terms of section 5, ...

(3) A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if –

(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and

(b) his or birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992.⁸⁴³

As these provisions make clear, children born to a refugee in South Africa can become citizens through naturalization or by birth and continuous residence in the country after attaining the age of 18. To qualify for the latter option, the child's birth must be registered in

⁸⁴² Act No 17 of 2010 amending the Citizenship Act No 88 of 1995. Section 1 (vi) places the age of majority at 18 years.

⁸⁴³ Act 51 of 1992.

accordance with the Birth and Death Registration Act.⁸⁴⁴ Although birth registration is a requirement for everybody, the birth of refugee children was not previously automatically entered into the National Population Register. It is therefore unclear whether this requirement will be interpreted as being peremptory or merely directory.

The requirement that the child lives in South Africa until the child the age of 18 is regrettable, as it sets up an 18-year minimum requirement, which is too long. In cases of children born in South Africa to refugee parents who have not been admitted to permanent residence but have reached the age of 18, naturalisation is the only viable option to ending their refugee status and preventing statelessness.

4.5. Naturalisation for Refugees: A Contentious Issue

Naturalisation is increasingly becoming a contentious issue as more and more western States are concerned about maintaining and securing national borders. Not only has one of the responses been to implement more restrictive asylum regimes that prevent ‘bogus’ applicants and grant refuge only to the deserving,⁸⁴⁵ governments are also either adopting systems that include additional tests for refugees or by delinking citizenship for refugee status.⁸⁴⁶ The United Kingdom, for example, has adopted a policy whereby applicants for citizenship undergo an English language and English life test and observe citizenship ceremonies.⁸⁴⁷

⁸⁴⁴ Ibid.

⁸⁴⁵ E Stewart & G Mulvey 'Seeking Safety Beyond Refuge: The Impact of Immigration and Citizenship Policy upon Refugees in the UK' (2014) 40 (7) *Journal of Ethnic and Migration Studies* at 1023-1039.

⁸⁴⁶ Ibid.

⁸⁴⁷ Stewart op cit note 846 at 1024.

Refugees have, unfortunately, become tied into broader debates on general migration and race relations policies, and are generally portrayed as a threat to national security.⁸⁴⁸ Regrettably, this has led to the move from granting permanent refugee status to granting refugee status for a limited period. This system takes away the basis on which refugees build their lives – certainty of their status.

4.6. Recent Reforms

South Africa, in common with some countries, is looking at delinking refugee status from citizenship.⁸⁴⁹ Recent efforts to reform South African refugee policy suggest a shift to a more restrictive approach to naturalisation for refugees. The 2016 Green Paper seeks to de-link refugee status from residency and naturalisation. It states that ‘there should be no automatic progression or right to permanent residency or citizenship in law or in practice; and the granting of permanent residency and citizenship should be delinked’.⁸⁵⁰ It further states:

Steps should be taken to ensure due weight is given to the value of the status of permanent residence and of citizenship, including the level of approval necessary. The process for awarding citizenship should ensure that rights and responsibilities are explained, understood; and ensure that the conditions attached to them are accepted by those to whom the status is conferred.⁸⁵¹

⁸⁴⁸ Ibid at 1026.

⁸⁴⁹ The 2016 Green Paper op cit note 473, chapter 4, at 39-42.

⁸⁵⁰ Ibid.

⁸⁵¹ 2016 Green Paper op cit note 473.

With this approach, citizenship is clearly seen as a prestigious status.⁸⁵² Its function is mainly to control access to the nation and refugees are excluded. The 2016 Green Paper also states that the granting of citizenship should be considered exceptional. A list of those who have applied for citizenship through naturalisation would be approved by the responsible Minister and published periodically.⁸⁵³

The 2016 Green Paper⁸⁵⁴ views its approach to residency or naturalisation as being ‘mechanical and compliance-based’, and not tailored to achieve specific strategic goals such as building the nation. It states: ‘... it is a misconception that immigrants have a constitutional right to progress toward residency or citizenship status. A sovereign State has the prerogative to determine who enters its territory and to enact laws accordingly’.⁸⁵⁵ In short, the Green Paper represents a greater assertion of sovereignty over naturalisation than has been done since 1993. However, South Africa cannot ignore its international obligations to refugees.⁸⁵⁶ The Green Paper is clearly inconsistent with international law which urges States to naturalise and assimilate refugees who cannot be returned to their home countries.

5. CONCLUSION

Even though there is legal pathway to ending refugee status in South Africa, refugees have been in the country as refugees for a long duration. This thesis argues that there should be an

⁸⁵² P S Masumbe ‘The Process of Naturalisation of Refugees under International and South African Law and its Implications for Human Rights’ PHD Thesis, Nelson Mandela School of law, University of Fort Hare, South Africa (2015).

⁸⁵³ 2016 Green Paper op cit note 473.

⁸⁵⁴ Ibid.

⁸⁵⁵ Ibid.

⁸⁵⁶ Hathaway op cit note 36.

end to refugee status. However, the available avenues of ending refugee status in South Africa are largely inaccessible because of the complex manner in which they are regulated and administered. The administrative body responsible for facilitating access to permanent residence and naturalisation has interpreted the law in such a harsh manner that it has made these pathways superfluous. This chapter argues that if the law in South Africa is correctly applied, we would have no protracted refugee situation.

CHAPTER SEVEN

In Chronic Exile: An Untenable Situation

Conclusions and Recommendations

1. INTRODUCTION

This thesis set out to analyse the phenomenon of protracted refugee situations and its implications for the rights of refugees. The primary concern was to find out whether such a phenomenon was envisaged in international law and its consequences anticipated. More importantly, the thesis set out to investigate whether a protracted refugee situation exists in South Africa and whether South Africa has taken concrete steps to address it.

These questions are worth exploring. In some African countries⁸⁵⁷ and other parts of the world,⁸⁵⁸ armed conflicts have gone on for considerable periods of time, displacing many people who have remained refugees for more than a decade. These refugees are found in South Africa and other African countries. On a broader level, the world is currently witnessing an unprecedented increase of refugees into Europe, which some commentators have described as Europe's greatest migration crisis since World War II.⁸⁵⁹

Much of the scholarly attention has been directed at the current European refugee situation, neglecting refugees in protracted situations. These refugees deserve consideration from States and the UNHCR so that durable solutions can be found and implemented for their benefit.

⁸⁵⁷ P Dorrie 'The Wars Ravaging Africa in 2016, available at <http://nationalinterest.org/blog/the-buzz/the-wars-ravaging-africa-2016-14993>, accessed on 12 March 2017.

⁸⁵⁸ See <http://foreignpolicy.com/2017/01/05/10-conflicts-to-watch-in-2017/>, accessed on 12 March 2017.

⁸⁵⁹ M Urban 'Europe Is Facing the Biggest Refugee Crisis since WWII', available at www.huffingtonpost.com/miguel-urban/the-balkans-refugees-_b_8103868.html, accessed on 1 March 2017; see also <https://news.vice.com/.../the-year-europe-buckled-under-the-biggest-refugee-crisis-sin>, accessed on 1 March 2017; See also www.businessinsider.com/r-migrant-tragedies-on-land-and-sea-claim-hundreds-of-liv, accessed on 2 March 2017.

2. THE NATURE OF ‘PROTRACTED REFUGEE SITUATIONS’

Both the UN Refugee Convention and the OAU Convention do not expressly refer to the term ‘protracted refugee situation’. However, the UNHCR has since 2001 considered it to be a serious legal problem and made several attempts to define it and find ways of addressing it. What motivated the UNHCR to study this concept was the discovery that some refugees remained with this status for a long time, and as such, their needs changed radically, suggesting that this class of refugees needed unique ways of addressing their needs.

After several attempts, the UNHCR came up with a comprehensive definition of ‘protracted refugee situations’ in 2009. According to this definition, this term denotes ‘situations where refugees have been in exile for five years or more after their initial displacement, without immediate prospects for implementation of durable solutions’.⁸⁶⁰ As was shown in chapter two, this definition represents a marked improvement on the previous definitions. Firstly, it does not make any specific reference to the minimum number of refugees that must have lived in a host state for more than five years. It also does not make any assumptions about the geopolitical territory where such situations can be found. Consequently, it does not matter, for purposes of deciding whether a particular group of refugees are in a protracted refugee situation, to ask how many refugees are involved and where their host state is. The salient elements of this definition are: that the refugee has been in exile for more than five years after the initial displacement and that there are no immediate prospects for the implementation of durable solutions.

⁸⁶⁰ The 2009 UNHCR ExCom Conclusion op cit note 21.

As was shown in chapter two, the phenomenon of refugees in protected situations is not new. Examples of refugees who have lived with this status for a long time include Palestinian refugees, post-colonial African refugees and Sahrawi refugees.

Also shown in chapter two, protracted refugee situations are caused directly and indirectly. Direct causes include persistent conflict in the countries of origin and the refusal by refugees to return home due to compelling reasons such as fear that the refugee will be subjected to persecution despite the fact that there has been fundamental change in the country of origin. Indirect causes include the reluctance by host states to provide alternative solutions to ending refugee status such as permanent residence, naturalisation or resettlement in a third country.

3. PROTRACTED REFUGEE SITUATION IN SOUTH AFRICA

According to UNHCR, South Africa is host to 112 000 refugees.⁸⁶¹ The largest proportion of these refugees is from Somalia and the DRC. Somalian refugees have fled from their country to South Africa since 1994. Other refugees that ended up in South Africa from the mid-1990s are Burundian, Congolese and Rwandan refugees. Some of these refugees have been in South Africa for more than 20 years and remain refugees to date.

The direct cause of this protracted situation is that internal conflict in Somalia and part of the DRC has continued to take place. Burundi has also been mired in political repression which prevents its citizens from returning home. Although Rwanda is stable, ethnicity and political repression have acted as a disincentive for Rwandan refugees to return. The indirect cause of this situation has been the failure of South Africa to implement its ‘assimilation and naturalisation’ laws for refugees.

⁸⁶¹ See <http://www.un.org.za/unhcr-branded-material-engages-south-africa-and-its-youth-on-xenophobia/>, accessed on 13 March 2017.

This is a situation that should no longer be ignored by the UNHCR and the South African government. While elsewhere the UNHCR has recognised Congolese, Somali and Burundian refugees as refugees in protracted situations,⁸⁶² in South Africa, the UNHCR has not raised the issue of protracted refugee situations at all. Neither has the UNHCR developed a comprehensive plan to assist these refugees in South Africa.

4. THE NEED FOR DURABLE SOLUTIONS – PROTRACTED REFUGEE SITUATIONS ARE AN AFFRONT TO HUMAN DIGNITY

Prolonged exile as a refugee is an abnormal condition. Although international law envisaged refugee status as a temporary condition, in practice it has been proven that refugees can remain refugees indefinitely and for long periods of time.

The phenomenon of protracted refugee status is an affront to human dignity. The fact that international law recognises various rights of refugees does not mean that refugees do enjoy these rights in practice. As was argued in chapter three, belonging to a national political community is critical to protecting the dignity and rights of refugees. Refugees in protracted situations lack this aspect of human dignity. They lack membership to the host political community and that of the country of origin. In some cases, refugees, especially children born in the host state, are rendered stateless. The uncertainty that surrounds the validity of their status as refugees (offered for short periods of time) and threats of withdrawal of their status adversely affect them psychologically.⁸⁶³

⁸⁶² Crisp op cit note 152.

⁸⁶³ See *Somali Association* supra note 676.

In South Africa, in particular, refugees are failing to enjoy the basic human rights accorded to them by international refugee law, the Refugees Act and the Constitution.⁸⁶⁴ South Africa's constant policy changes have added to the refugees' uncertainty. Refugees also experience high levels of insecurity as a result of their 'otherness'. Xenophobic tendencies toward refugees have added to their feelings of exclusion.⁸⁶⁵

As shown in chapter 3, international law provides several bases for ending refugee status. The first is repatriation. However, as has been argued in chapter three, repatriation is unavailable where the country of origin remains unsafe and insecure – in short, if the reasons of the initial flight remain. The second option is assimilation, now more commonly known as local integration. The problem with this solution is that it has been interpreted narrowly such that it excludes permanent residence, which is a more durable solution than local integration. Unlike local integration, which does not end refugee status, permanent residence does and hence protects the dignity of the refugee more robustly. The third solution is naturalisation. This solution is the most suitable for refugees who do not want to relinquish their nationality. Like permanent residence, naturalisation provides the refugee full membership of the host state's political community. International law places two key obligations on states with regard to naturalisation: firstly, to facilitate the naturalisation of refugees and, secondly, to reduce the costs and burden of naturalisation. For states that claim that they cannot afford to naturalise or assimilate all refugees in protracted situations, they have a duty in international law to explore burden sharing with other states so that all or some of the refugees are resettled in a third state.

5. DURABLE SOLUTIONS IN SOUTH AFRICA

⁸⁶⁴ Constitution op cit note 511.

⁸⁶⁵ See chapter five, section 4.4 on xenophobia.

The thesis has shown that South African refugee law and policy has undergone radical transformation since the mid-1990s. Unlike in the past, South African law and policy is anchored in human rights. The Constitution enshrines a wide range of rights to which everyone including refugees is entitled. In *Watchenuka*,⁸⁶⁶ the Supreme Court of Appeal held that asylum seekers are a vulnerable group of people that fall on the ‘lowest rungs of the immigration ladder’. Like everybody else, they are entitled to be treated with dignity and to all rights that the Constitution guarantees to everyone. In *Khosa*,⁸⁶⁷ the Constitutional Court held that permanent residents are entitled to apply for social grants. Since refugees in protracted situations share similarities with immigrants who have permanent residence, that is, being in South Africa longer than five years, *Khosa* could be interpreted to mean that refugees in protracted situations are also entitled to apply for social grants. The Refugees Act specifically states that these constitutional rights, except the few rights that are reserved for citizens, can be claimed by refugees.

In keeping with this human rights-based approach, South Africa has an urban refugee policy, which means that refugees are not housed in refugee camps but live in urban areas side by side with local people.

Despite this noble constitutional framework for refugees, South Africa has not developed and implemented a clear and comprehensive social policy on the integration of refugees. Since the emphasis has been on formal integration, refugees have largely been left to their own devices as far as their integration, survival and protection is concerned. This oversight partly explains the difficulties that refugees encounter in the communities they live, including

⁸⁶⁶ *Watchenuka* supra note 67.

⁸⁶⁷ *Khosa* supra note 571.

discriminatory treatment by the police and DHA officials, and recurrent episodes of xenophobic violence.

Although South Africa is a host to a considerable number of refugees in protracted situation, the government and the UNHCR have not yet acknowledged this fact. The harm suffered by this group of refugees and their special needs in South Africa have not been fully understood by the South African government and the UNHCR. It is therefore not surprising that South Africa refugee policy does not fully address this issue.

In principle, South African refugee law recognises the temporary nature of refugeehood, and has recognised two pathways to ending refugee status: permanent residence and naturalisation. However, the manner in which these pathways have been formulated is complicated. As shown in chapter six, these pathways have been prescribed following the bifurcated approach such that permanent residence precedes naturalisation. These options are regulated by three separate Acts – the Refugee Act (general refugee law which refers to the two other Acts), the Immigration Act (permanent residence) and Citizenship Act (naturalisation) – and thus are conceived outside the specific legal framework of refugee law, which is protection oriented. In conceiving of permanent residence and naturalization outside the protective framework of refugee law, South Africa has acted in accordance with its mindset that refugee status should not open a ‘back-door’ to durable immigration status. Even after accepting that refugee status can lead to a durable immigration status and legislating to that effect that in some instances refugee status can lead to permanent residence, South Africa’s reluctance to grant a durable immigration status has become apparent in its implementation of the law.

This thesis has demonstrated that refugees in South Africa are failing to access the two durable solutions recognised by its domestic laws. Consequently, many refugees have held that status for more than five years after being recognised as refugees with no durable

solution in sight. For one thing, the law stipulating eligibility for permanent residence and naturalisation is inconsistent with international law partly because it states that a refugee can apply for this durable solution five years after being granted refugee status. As for naturalisation, an additional minimum of five years is required. According to the UNHCR, a protracted refugee situation arises five years after displacement and refugees in this situation deserve durable solutions that are geared towards ending their refugee status.

One of the greatest stumbling blocks to access to permanent residence and naturalisation is the certification process that precedes the application for permanent residence. *The Somali Association of South Africa and Others v Chairperson of the Standing Committee for Refugee Affairs*,⁸⁶⁸ discussed in chapter six, shows that about 167 Somali refugees have lived in South Africa for more than five years, with some as long as 10 or 20 years. All these refugees were denied certification on the putative ground that they will not continue to be refugees indefinitely or for the foreseeable future. Surprisingly, some of these refugees have had their status renewed for a further four years since their certifications were denied. The certification process is opaque and has not issue guidelines on the interpretation of the words ‘being a refugee indefinitely’ or ‘foreseeable future’. The certification process has been described as a cumbersome process, which asks refugees to make predictions about the future based on information they may not be able to gather, given their vulnerable situation and lack of the resources and knowhow to collect relevant evidence.

Even though *some* refugees may have been granted permanent residence, the continued rejection of others, without withdrawing their refugee status, means that they continue to live as refugees in South Africa. The practice of rejecting applications for a durable stay has led many refugees to join the ranks of refugees in a protracted situation. In South Africa, these refugees may not be visible, like in refugee camps, but they are present.

⁸⁶⁸ *Somali Association* supra note 676.

6. RECOMMENDATIONS

In view of these findings, the following recommendations can be made.

6.1. Formal Recognition of a Protracted Refugee Situation in South Africa

First and foremost, South Africa and the UNHCR must formally recognise that refugees have been in South Africa for a very long time and that some of these refugees are failing to access a durable solution. This thesis has demonstrated that such refugees cannot be repatriated because of the on-going violence in their countries of origin, the resettlement programme has assisted only a handful of refugees in South Africa, and the reluctance by the DHA's Standing Committee to certify that these refugees are likely to remain refugees indefinitely.

Since South Africa has accepted the 2009 UNHCR Executive Committee's Conclusion on Protracted Refugee Situations, it has a duty to acknowledge that some of the refugees in South Africa are in a protracted situation, and that such situation is harmful to the affected refugees and requires a remedy. The South African government should develop a policy on refugees that have lived in South Africa for five years or longer with no durable solution in sight. This requires more than a mere acknowledgement of the situation; it requires an undertaking to act in the interest of this group.

6.2. The Role of the UNHCR

It is also incumbent on the UNHCR to embark on a programme to identify such refugees in South Africa and to take appropriate steps to ensure their protection. As this thesis has

shown, South Africa has failed to adequately protect refugees in a protracted situation present on its territory. The UNHCR has to play a role in finding a suitable solution for such refugees.

The first important step is for the UNHCR to identify the refugees in this situation. Although the fact that refugees in South Africa are urban-based makes it difficult to trace them and that the South African government has not kept or disclosed statistics about refugees in a protracted situation, the UNHCR can, with the assistance of its partners, compile such data. Many refugees seek services from the UNHCR's partners⁸⁶⁹ and the UNHCR directly at its Pretoria office. All refugees in South Africa are issued with reference numbers which reflect the year of their application for status. This information can be used by the UNHCR to determine the extent of the problem of refugees living in prolonged exile in South Africa.

In addition to identifying such refugees, the UNHCR can use its good offices to engage the South African government on the prejudices suffered by such refugees and on implementing its domestic local legislation. The UNHCR can also offer support to legal partners, who can by means of litigation, unlock the bottlenecks to permanent residence and naturalisation. The UNHCR can also assist refugees by legally empowering them.

Furthermore, the UNHCR can appeal to other countries to share this burden and facilitate the resettlement of refugees. To find durable solutions, the UNHCR needs to move away from the care and maintenance approach.

6.3. Legal and Policy Reform

⁸⁶⁹ UCT Refugee Law Clinic; Lawyers for Human Rights; NMMU Law Clinic; Cape Town Refugee Centre; Jesuit Refugee Service.

It has already been established that while there is a legal pathway for refugees to end their refugee status in South Africa, refugees have faced many challenges to accessing that pathway. Some of these challenges lie in the law itself and hence require amendment for them to be resolved.

As the thesis has shown, international law expects states that host long-stay refugees to facilitate their naturalisation and to reduce the burden of applying for naturalisation. To comply with these obligations, South Africa needs to simplify the procedures and requirements of applying for permanent residence and naturalisation. More importantly, given their vulnerability, refugees must not be subjected to requirements that are more stringent than those prescribed for other immigrants. For example, the duration of asylum status ought to be included in the computation of the minimum five years that refugees must satisfy before they can apply for permanent residence or naturalisation. Crucially, South Africa needs to develop clear guidelines for the Standing Committee of Refugee Affairs with regard to the requirements for certification, such as what is meant by the terms ‘indefinite refugee status’ and ‘being a refugee for the foreseeable future’, and how many times refugee status can be renewed.

6.4. Burden-Sharing and International Solidarity / Resettlement

If South Africa finds that granting refugees in protracted situations durable solutions is too burdensome, it should in good faith acknowledge this and seek assistance from other States. Having ratified the OAU Refugee Convention, South Africa is entitled to invoke the concept of burden-sharing.

6.5. Legal Empowerment of Refugees in Protracted Situations

Refugees in South Africa do not only have a moral claim to end their refugee status, they also have a legal claim.⁸⁷⁰ A durable stay (permanent residence or naturalisation) may be difficult to access in South Africa, but it is a claim founded on the law nevertheless. Refugees need to be legally empowered to gain access to this right.

Enabling refugees to use the law and legal mechanisms to protect and advance their rights and acquire greater control over their lives could have important implications for their well-being.⁸⁷¹ Admittedly, the effectiveness of legal claims will depend on the strength of the governance system in a country. However, this should not be an issue in South Africa where the judiciary has been able to vindicate many rights of refugees.⁸⁷²

The courts can play an important role in limiting the power of the host State and providing an opportunity for refugees to be heard. The legal empowerment of refugees is not an unfamiliar tool to be used by the UNHCR; the UNHCR has many legal partners in South Africa.⁸⁷³ Legal empowerment is a tool that South Africans generally are familiar with.⁸⁷⁴

⁸⁷⁰A L Purkey 'A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations' (2013) 27 *International Journal Of Refugee Studies* at 261: The normative force gives the law power that can be transferred: an individual with a legal claim has a more practical power to control her destiny than one who merely has a moral claim; See also Donnelly, 'The law has a particular normative force that is different and in many ways superior to that of other types of claims and that will often trump claims based on tradition, social utility or mere preference.

⁸⁷¹ The 'normative force' of the law is based substantially on the principle that everyone is equal before the law and subject to the law whether citizen or refugee.

⁸⁷² See various cases discussed in chapter five.

⁸⁷³ Partners op cit note 870.

The United Nations Development Programme (UNDP) has also commissioned a study on the links between poverty and the law, which has highlighted the need of legal empowerment of vulnerable groups.⁸⁷⁵

Many vulnerable populations in South Africa struggle to access the courts. Refugees face additional obstacles. A major aspect of the legal empowerment of refugees is legal assistance to navigate the complex process of seeking permanent residence.

To ensure the effective administration of justice, refugees must be aware of their rights and the applicable laws. Education and training is therefore a central feature of legal empowerment. Empowering refugees with knowledge about their rights is not sufficient: refugees must, in addition, be able to enforce those rights. This requires access to specialised legal services.

Of course, there are limits on the effectiveness of judicial remedies, such as the disregard of court orders, narrow interpretation of the law by some courts, discriminatory treatment, and lack of access to legal aid. However, human rights advocates in South Africa have generally been able to help their clients navigate around these obstacles. The legal empowerment of refugees is therefore strongly recommended.

⁸⁷⁴ For example, *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 and *Grootboom* supra note 712, and cases by Equal Education, Lawyers for Human Rights, as well as the UCT Refugee Rights Clinic cited in chapter five.

⁸⁷⁵ UNDP Report ‘Making the Law Work for Everyone’, available at www.undp.org/.../aplaws/.../legal...legal.../making_the_law_work_II.pdf, accessed 20 January 2017.

7. SOUTH AFRICANS MUST PRACTICE UBUNTU

For refugees to live meaningful lives in South Africa, South Africans must act in accordance with the spirit of Ubuntu. The fact that refugees are failing to integrate demonstrates a clear reluctance to welcome refugees into South African society formally and informally. Ubuntu, which signifies inclusivity rather than marginalisation, is implicit in fundamental values that underlie our Constitution.

With regard to refugees, South Africans can practice Ubuntu by saying ‘no to xenophobia’, by interpreting the law fairly and justly, by showing respect to all migrants, and by recognising refugees as a vulnerable group.

In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*,⁸⁷⁶ Sachs J emphasised the legal obligations owed to refugees in South Africa. Referring approvingly to the dictum in *Port Elizabeth Municipality v Various Occupiers*,⁸⁷⁷ saying that *ubuntu* suffuses South Africa’s constitutional democracy and that people in the Republic are not islands unto themselves. Although this statement was made in the context of eviction, Sachs J held that it ought to apply with equal vigour ‘to our relationship with the rest of the continent’.⁸⁷⁸ This was in line with ‘the concept of human interdependence and burden-sharing in relation to catastrophe’, which Sachs J held is ‘is associated with the spirit of *ubuntu-botho*’.⁸⁷⁹

South African Courts have acknowledged the vulnerability of refugees generally, but not the distinct disadvantages faced by refugees in a protracted situation. Both the South African

⁸⁷⁶ Supra note 584.

⁸⁷⁷ 2005 (1) SA 217 (CC).

⁸⁷⁸ Supra note 584 at para 145.

⁸⁷⁹ Ibid.

government and the UNHCR need to recognise the harmful effects of the existing protracted refugee situation in the country, especially its impact on the human dignity of the affected refugees, its denial of their membership to a political or national community and its potential cause statelessness.

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